No. 97-889-CFX **Title:** Ceasar Wright, Petitioner
v.
Universal Maritime Service Corporation, et al.

Docketed:
November 28, 1997

Court: United States Court of Appeals for the Fourth Circuit

Entry	Date	Proceedings and Orders
	Oct 15 1997	Application (A97-281) to extend the time to file a petition for a writ of certiorari from October 27, 1997 to November 26, 1997, submitted to The Chief Justice.
	Oct 16 1997	Application (A97-281) granted by the Chief Justice extending the time to file until November 26, 1997.
	Nov 26 1997	Petition for writ of certiorari filed. (Response due January 27, 1998)
	Dec 11 1997	Order extending time to file response to petition until January 27, 1998.
	Jan 27 1998	Brief of respondents Universal Maritime Service Corporation, et al. in opposition filed.
	Feb 11 1998	DISTRIBUTED. February 27, 1998
	Feb 20 1998	Reply brief of petitioner Ceasar Wright filed.
	Mar 2 1998	Petition GRANTED. SET FOR ARGUMENT October 7, 1998. **
	Mar 30 1998	Order extending time to file brief of petitioner on the merits until May 7, 1998.
	May 5 1998	Brief amicus curiae of National Academy of Arbitrators filed.
	May 7 1998	Joint appendix filed.
	May 7 1998	Brief of petitioner Ceasar Wright filed.
	May 7 1998	Brief amici curiae of National Employment Lawyers Association, et al. filed.
	May 7 1998	Brief amici curiae of Lawyers' Committee for Civil Rights Under Law, et al. filed.
	May 7 1998	Brief amici curiae of United States and Equal Employment Opportunity Commission filed.
	May 7 1998	Brief amici curiae of AFL-CIO, et al. filed.
	May 7 1998	Brief amici curiae of Massachusetts, et al. filed.
	May 7 1998	Brief amici curiae of American Civil Liberties Union, et al. filed.
	May 14 1998	Order extending time to file brief of respondent on the merits until June 29, 1998.
	May 21 1998	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Jun 26 1998	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Jun 26 1998	Brief amicus curiae of Chamber of Commerce of the United States filed.
	Jun 29 1998	Brief amicus curiae of National Association of Waterfront Employers filed.
	Jun 29 1998	Brief amicus curiae of National Association of Manufacturers filed.

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Entry	Date	Proceedings and Orders
	Jun 29 1998	Brief amici curiae of Equal Employment Advisory Council, et al. filed.
	Jun 29 1998	Brief of respondents Universal Maritime Service Corporation, et al. filed.
	Jun 29 1998	Brief amicus curiae of Securities Industry Association filed.
	Aug 3 1998	Reply brief of petitioner Ceasar Wright filed.
	Aug 11 1998	CIRCULATED.
	Aug 26 1998	Record filed.

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Supreme Court, U.S.
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No. 97-

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1997

CEASAR WRIGHT

Petitioner,

v.

UNIVERSAL MARITIME SERVICE CORP.;
STEVENS SHIPPING & TERMINAL COMPANY;
STEVEDORING SERVICES OF AMERICA;
RYAN-WALSH, INC.;
STRACHAN SHIPPING COMPANY;
CERES MARINE TERMINALS, INC.; and
SOUTH CAROLINA STEVEDORES ASSOCIATION,

Respondents.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Was the court below correct in holding -- contrary to this Court's decisions in *Alexander v. Gardner-Denver Co.* and other cases, and contrary to seven other circuits -- that a general arbitration clause in a collective bargaining contract bars an employee covered by the contract from filing his own lawsuit under a federal anti-discrimination statute?

PARTIES

The parties are all shown in the caption. None of the corporate Respondents is a publicly held corporation or a subsidiary of a publicly held corporation, according to disclosures filed by Counsel for Respondents in the court below.

TABLE OF CONTENTS

Page

Questions Presented I

Parties ii

Table of Contents iii

Table of Authorities iv

Opinions Below 2

Jurisdiction 2

Statutory Provisions Involved.................................... 3

Statement of the Case 3

Reasons for Granting the Writ 8

1. The writ should be granted to resolve the serious conflict between the decision below and the decisions of seven other courts of appeals that have held, since *Gilmer*, that an employee has a right to bring suit in federal court on a federal statutory claim, independent of the grievance/arbitration procedures of a collective bargaining agreement. 9

2. This Court's decisions in *Alexander v. Gardner-Denver Co.* and *Gilmer v. Interstate/Johnson Lane Corp.* require that statutory discrimination claims be submitted to a court, unless the employee personally waives his right to a judicial trial. 13

3. The decision below ignores settled precedent on an important question that constantly confronts both lay parties and federal courts. 18

Conclusion 21

TABLE OF AUTHORITIES

Page

CASES:

Alexander v. Gardner-Denver Co.,
415 U.S. 36 (1974) 8, 9, 12-18, 20

Austin v. Owens-Brockway Glass Container, Inc.,
78 F.3d 875 (4th Cir.), *cert. denied,*
117 S.Ct. 432 (1996) 2, 6, 7, 9-12, 14, 16-20

Barrentine v. Arkansas-Best Freight System,
450 U.S. 728 (1981) 9, 14, 15

Big Vein Pocahontas Co. v. Browning,
137 Va. 34, 120 S.E. 247 (1923) 11

Brisentine v. Stone & Webster Engineering Corp.,
117 F.3d 519 (11th Cir. 1997) 10, 11

Brown v. TWA, ___ F.3d ___, 156 L.R.R.M. 2481,
1997 WL 610821 (4th Cir. Oct. 6, 1997),
slip op. at 7, *reh. denied,* Nov. 10, 1997 . . . . 9, 18

Buckley v. Gallo Sales Co.,
949 F.Supp. 737 (N.D. Cal. 1996) 11

Bush v. Carrier Air Conditioning,
940 F.Supp. 1040 (E.D.Tex. 1996) 11

Cole v. Burns Intern. Security Services,
105 F.3d 1465 (D.C. Cir. 1997) 10, 16

Gilmer v. Interstate/Johnson Lane Corp.,
500 U.S. 20 (1991) 5, 7-9, 12-15, 18-20

Harrison v. Eddy Potash, Inc., 112 F.3d 1437
(10th Cir.), *pet. cert. filed*, 66 U.S.L.W. 3137
(Aug. 6, 1997) 10, 12

Hill v. American Nat'l Can Co.,
952 F.Supp. 398 (N.D.Tex. 1996) 11

Krahel v. Owens-Brockway Glass Container, Inc.,
971 F.Supp. 440 (D.Ore. 1997) 11

LaChance v. Northeast Publishing, Inc.,
965 F.Supp. 177 (D.Mass. 1997) 11

Livadas v. Bradshaw, 512 U.S. 107 (1994) 14, 15

*Local 1422, ILA, AFL-CIO v. S.C. Stevedores
Association, et al.*, C.A. No. 2:97-2886-21
(D.S.C. filed Sept. 22, 1997) 6

Love v. Pullman Co., 404 U.S. 522 (1972) 18

Martin v. Dana Corp., 114 F.3d 421, *vacated*,
114 F.3d 428 (3d Cir. 1997) 11

McDonald v. City of West Branch,
466 U.S. 284 (1984) 14, 15

O'Connor v. Consolidated Coin Caterers Corp.,
116 S.Ct. 1307 (1996) 19

Penny v. United Parcel Service, ___ F.3d ___,
156 L.R.R.M. 2618 (Oct. 22, 1997) 10

Pryner v. Tractor Supply Co., 109 F.3d 354 (7th Cir.),
cert. denied, ___ U.S. ___, 118 S.Ct. 294,
66 USLW 3277 (Oct. 14, 1997) 10, 12, 16

Robinson v. Shell Oil Co., 117 S.Ct. 843 (1997) 19

Rodriguez v. Shearson/American Express, Inc.,
490 U.S. 477 (1989) 8

Tran v. Tran, 54 F.3d 115 (2d Cir 1995) 10

Varner v. National Super Markets, Inc.,
94 F.3d 1209 (8th Cir. 1996), *cert. denied*,
117 S.Ct. 946 (1997) 10, 12

Zipes v. TransWorld Airlines, Inc.,
455 U.S. 385 (1982) 18

STATUTES:

28 U.S.C. § 1254(1) 2

42 U.S.C. § 12117 3

42 U.S.C. § 12212 3

42 U.S.C. § 2000e-(f) 3

Americans with Disabilities Act,
42 U.S.C. § 12101 *et seq.* 3

OTHER:

Charles J. Coleman & Theodora T. Haynes,
Labor Arbitration: An Annotated Bibliography
(ILR Press: 1994) 13

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CEASAR WRIGHT

Petitioner,

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UNIVERSAL MARITIME SERVICE CORP.;
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Respondents.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fourth Circuit is unreported. It is referenced in a Table at 121 F.3d 702 (July 29, 1997), and is reprinted at App. 1a.

The Order of the United States District Court for the District of South Carolina, dated September 25, 1996, is unreported, and is reprinted at App. 6a. That Order adopted the ruling recommended by a Magistrate Judge in a Report dated June 14, 1996, reprinted at App. 19a. The further Order of the District Court, dated December 5, 1996, is reprinted at App. 14a.

The decision of the United States Court of Appeals for the Fourth Circuit in *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir.), *cert. denied,* 117 S.Ct. 432 (1996), on which the courts below relied without discussion, is reprinted, for convenient reference, at App. 34a.

JURISDICTION

The Opinion of the United States Court of Appeals for the Fourth Circuit was dated July 29, 1997. The time period for filing the Petition for Writ of Certiorari was extended through November 26, 1997, by Order of Chief Justice Rehnquist entered on October 16, 1997. This Court's certiorari jurisdiction arises under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This matter involves the enforcement of the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* The pertinent portions of the Act, particularly 42 U.S.C. §§ 12117 (adopting 42 U.S.C. § 2000e-(f)), 12212, are printed at App. 27a.

STATEMENT OF THE CASE

Petitioner was regularly employed as a longshoreman in the Port of Charleston, beginning in 1970, through the hiring hall operated by Local 1422, International Longshoreman's Association, AFL-CIO. In early 1992, while working for respondent Stevens Shipping, petitioner fell off the top of a freight container, shattering his right heel and injuring his back. These injuries disabled him from waterfront employment for an extended period. He was examined by several physicians, who offered different opinions. His treating physician thought petitioner would probably be permanently and totally disabled from longshore employment, while other physicians expressed the opinion that petitioner could return to longshore employment. Stevens Shipping, relying on these latter opinions, stopped paying disability benefits in 1993. (JA 203).

In May, 1994, Petitioner entered a final settlement in which he compromised his workers compensation claims, including all claims for total permanent disability, for $250,000. App. at 3a. Although substantial, this settlement did not compensate Petitioner for total permanent disability. The settlement for permanent periodic disability payments was stipulated to be only $312.13 per month compared to his compensation rate of $3,033.16 per month (JA 199).

Stevens Shipping, in compromising the claim, refused to agree that Petitioner was totally and permanently disabled. No tribunal found Petitioner totally and permanently disabled.

A major factor in petitioner's physical disability was a bony spike in his right heel that made walking extremely painful. Petitioner's physician expected this condition to be permanent, but in late 1994 the bony spike spontaneously resorbed. Petitioner's physician documented this improvement and found that petitioner was physically able to return to work.

In January 1995, petitioner returned to the hiring hall to seek assignments for work. On nine of the ten days from January 2 through January 11, 1995, petitioner was referred for employment by Local 1422, ILA, and worked for four of the respondent employers during those nine days. Each of these respondents accepted Petitioner as qualified for his position, and none had any complaints about his work performance. App. at 21a. Some of these Respondents asked for written approval from petitioner's treating physician for Petitioner to return to work, and this was provided.

On January 11, 1995, the Respondent Employers agreed among themselves that they would all refuse to accept Petitioner for work. In virtually identical letters to the president of Local 1422, ILA, the Respondents stated that Petitioner was previously "certified as permanently and totally disabled." They continued that "once an individual is certified as permanently and totally disabled, he is no longer qualified to perform longshore work of any kind."

Petitioner immediately consulted with the president of Local 1422, ILA, his bargaining representative. The local union president wrote to the Respondents to protest that the refusal to accept Petitioner for work was a violation of the Americans with Disabilities Act and of the terms of the Collective Bargaining Agreement. The union president did not file a grievance for Petitioner under the Collective Bargaining Agreement; instead, he advised Petitioner to retain private counsel to pursue a statutory claim under the Americans with Disabilities Act. By the time Petitioner located counsel, a grievance under the Bargaining Agreement was "out of time."

The Collective Bargaining Agreement did not refer to the Americans with Disabilities Act nor to any other federal statute prohibiting employment discrimination. Rather, the phrasing of the Agreement said it covered "all matters affecting wages, hours, and other terms and conditions of employment," and the grievance and arbitration procedure applied to "matters under dispute between the parties." The Agreement was adopted effective November 30, 1990, before this Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). The Agreement had never been applied to any worker's federal statutory claim of employment discrimination.

Petitioner promptly invoked his statutory rights by filing timely charges of discrimination with the Equal Employment Opportunity Commission (EEOC) against all Respondents. After the EEOC issued a Notice of Right to Sue on each charge, Petitioner filed this action in January, 1996.

Two months later, the United States Court of Appeals for the Fourth Circuit issued its opinion in the case of *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir. March 12, 1996), *cert. denied*, ___U.S. ___, 117 S.Ct. 432 (1996), which held that an applicable labor arbitration agreement "ousts a court of jurisdiction" to hear statutory claims of discrimination brought by individual employees. Petitioner then offered to arbitrate, but Respondents refused.

On cross motions for summary judgment, a Magistrate Judge recommended that Petitioner's suit "be dismissed without prejudice for want of jurisdiction," on the authority of *Austin*. App. at 26a. The District Judge agreed in an Opinion dated September 25, 1996. He later denied a timely Motion for Reconsideration by Order dated December 5, 1996.[1]

Since the employers had already refused to arbitrate the claims, the dismissal of the suit without either compelling arbitration or retaining jurisdiction ended the statutory claims.

Petitioner prosecuted a timely appeal to the Court of Appeals. That Court affirmed the judgment on July 29, 1997, holding that Wright's only recourse was a union-sponsored grievance, and that he had no right to sue under the ADA:

> "In Austin, this court established that collective bargaining agreements to arbitrate employment disputes are binding upon individual employees even when the dispute involves a federal cause of action. 78 F.3d at 885. Where such an agreement exists, a failure to process a claim under the agreement precludes a court from exercising jurisdiction over the merits of the claim. Id. Wright did not submit his claim to arbitration." App at 4a.

The Court further held that an arbitration clause with general language in a bargaining agreement would be construed to cover the arbitration of statutory claims:

> "An employer need not provide a laundry list of potential disputes in order for them to be covered by an arbitration clause. For example, in Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991), the Supreme Court held that a plaintiff was required to submit his ADEA claim to arbitration where the arbitration agreement covered 'any dispute, claim or controversy.' Id. at 23. The language of the CBA at issue in this case is equally broad, covering 'all matters' regarding 'terms and conditions of employment.' This language easily encompasses Wright's ADA claim." App. at 4a-5a.

This petition followed.

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[1] In July, 1996, after the decision in *Austin v. Owens-Brockway Glass Container* changed the law in the Fourth Circuit, the union hiring hall referred Petitioner for work again, this time to two of the Respondents. Petitioner was again refused work. This time the union filed a grievance. The employer representatives have refused to process the grievance and have refused to arbitrate, whereupon the union has filed suit to compel arbitration. *Local 1422, ILA, AFL-CIO v. S.C. Stevedores Association, et al.*, C.A. No. 2:97-2886-21 (D.S.C. filed Sept. 22, 1997).

REASONS FOR GRANTING THE WRIT

Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), and cases following it established a "bright-line" rule: because the union, rather than any individual employee, controls the exercise of the grievance / arbitration procedure under a collective bargaining agreement, a mandatory arbitration clause in such a labor agreement does not bar an employee's access to the courts to prosecute a claim based on a federal statute. The "bright-line" rule established by *Alexander* should not be changed: that rule promotes the effective enforcement of Congressional policies to prohibit employment discrimination and to resolve labor-management conflicts efficiently, it is fair, and it is easily followed by lay parties, The Fourth Circuit's attempt to discard this "bright-line" rule will embroil the courts in protracted litigation to define the contours of new rules.

The petition for a writ of certiorari should be granted because the decision below:

(1) conflicts with decisions of seven other circuits, applying *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), as preserved in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991);

(2) conflicts with decisions of this Court, particularly *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974)[2]; and

(3) decides an important question in a way that disrupts settled doctrines and practices in labor-management relations.

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[2] As this Court stated in *Rodriguez v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989), "If a precedent in this Court has direct application in a case, ... the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decision." The Fourth Circuit has not heeded that directive.

1. The writ should be granted to resolve the serious conflict between the decision below and the decisions of seven other courts of appeals that have held, since *Gilmer*, that an employee has a right to bring suit in federal court on a federal statutory claim, independent of the grievance/arbitration procedures of a collective bargaining agreement.

In *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir.), *cert. denied*, 117 S.Ct. 432 (1996), the Court of Appeals held that this Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), had effectively overruled *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). The court below extended the rationale of *Austin* to deny Petitioner relief.[3] Five courts of appeals have expressly rejected the result in *Austin* in holdings. Two others have endorsed, post-*Gilmer*, the continuing vitality of *Alexander v. Gardner-Denver Co.* No other Court of Appeals has applied *Austin* to a claim of a worker covered by a Collective Bargaining Agreement.

The appellate courts that have, in holdings, expressly rejected the central rationale of *Austin* are the following:

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[3] After the decision in this case, another panel of the Court of Appeals for the Fourth Circuit limited the scope of *Austin* slightly, where the arbitration clause is narrowly limited to disputes "'growing out of the interpretation or application of any of the terms of *this Agreement*, [emphasis in original]'" *Brown v. TWA*, ___ F.3d ___, 156 L.R.R.M. 2481, 1997 WL 610821 (4th Cir. Oct. 6, 1997), slip op. at 7, *reh. denied*, Nov. 10, 1997. The panel in *Brown* reaffirmed *Austin*. The rule in the Fourth Circuit still conflicts with the other circuits and with *Alexander* and *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728 (1981).

Sixth Circuit	*Penny v. United Parcel Service*, ___ F.3d ___, 156 L.R.R.M. 2618 (Oct. 22, 1997)
Seventh Circuit	*Pryner v. Tractor Supply Co.*, 109 F.3d 354, 365 (7th Cir.), *cert. denied*, ___ U.S. ___, 118 S.Ct. 294, 66 USLW 3277, 3281 (Oct. 14, 1997)
Eighth Circuit	*Varner v. National Super Markets, Inc.*, 94 F.3d 1209, 1213 (8th Cir. 1996), *cert. denied*, 117 S.Ct. 946 (1997)
Tenth Circuit	*Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1452-54 (10th Cir.), *pet. cert. filed*, 66 U.S.L.W. 3137 (Aug. 6, 1997)
Eleventh Circuit	*Brisentine v. Stone & Webster Engineering Corp.*, 117 F.3d 519 (11th Cir. 1997)
District of Columbia Circuit	*Cole v. Burns Intern. Security Services*, 105 F.3d 1465, 1478-79 (D.C. Cir. 1997) (dictum)
Second Circuit (Fair Labor Standards Act)	*Tran v. Tran*, 54 F.3d 115 (2d Cir 1995)

The rulings of the Fourth Circuit in *Austin* and in the decision below have created a fundamental conflict with other circuit courts[4] as to whether labor arbitration agreements can ever "oust the court of jurisdiction" to hear statutory claims.[5]

The opinion in *Brisentine*[6] stated the consensus of the other seven circuits, 117 F.3d at 526-27:

> Under [the law as it is now] ..., a mandatory arbitration clause does not bar litigation of a federal statutory claim, unless three requirements are met. First, the employee must have agreed individually to

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[4] A divided panel of the United States Court of Appeals for the Third Circuit initially held that arbitral remedies had to be exhausted, but only where the CBA provided that the individual employee could personally require arbitration; that opinion was vacated and the case set for reargument *en banc*. *Martin v. Dana Corp.*, 114 F.3d 421, *vacated*, 114 F.3d 428 (3d Cir. 1997). However, counsel is advised that, after the union filed a brief clarifying that the union, not the individual employee, controlled the decision to seek arbitration, the case was remanded to the panel for reargument, held November 21, 1997. Many District Courts in the First, Fifth, and Ninth Circuits have also rejected *Austin*. See, e.g., *LaChance v. Northeast Publishing, Inc.*, 965 F.Supp. 177 (D.Mass. 1997); *Bush v. Carrier Air Conditioning*, 940 F.Supp. 1040 (E.D.Tex. 1996); *Hill v. American Nat'l Can Co.*, 952 F.Supp. 398 (N.D.Tex. 1996); *Krahel v. Owens-Brockway Glass Container, Inc.*, 971 F.Supp. 440 (D.Ore. 1997); *Buckley v. Gallo Sales Co.*, 949 F.Supp. 737 (N.D. Cal. 1996). New cases appear to be added to the WESTLAW database every month.

[5] The only case cited by the majority in *Austin* for its position on "ouster of jurisdiction" was a state court decision, *Big Vein Pocahontas Co. v. Browning*, 137 Va. 34, 120 S.E. 247 (1923). 78 F.3d at 878 n.1.

[6] The facts of the present case are extremely close to the facts in *Brisentine*. In both, the employer refused to accept the employee when he was referred by a union hiring hall; the claim was under the ADA; and the union filed no grievance, but instead "advised Brisentine to file a complaint with the EEOC rather than file a grievance." 117 F.3d at 521, 525.

> the contract containing the arbitration clause -- the union having agreed for the employee during collective bargaining does not count. Second, the agreement must authorize the arbitrator to resolve federal statutory claims.... Third, the agreement must give the employee the right to insist on arbitration if the federal statutory claim is not resolved to his satisfaction in the grievance process. All three of those requirements were met in the *Gilmer* case, which is the latest word from the Supreme Court on the subject. None of the requirements were met in this case.

This case presents squarely for review the sole issue of the continuing vitality of *Alexander v. Gardner-Denver Co.* This issue arises literally daily, in some union-represented bargaining unit somewhere in the nation. As long as this conflict in the circuits lingers, this Court will continuously be presented with petitions for review of the issue. As cited above, the Court has already denied petitions for review in *Austin* from the Fourth Circuit, in *Varner* from the Eighth Circuit (see 65 U.S.L.W. 3420) and in *Pryner* from the Seventh Circuit (see 66 U.S.L.W. 3049). A petition for review from the Tenth Circuit is pending in *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1452-54 (10th Cir. 1997), *pet. cert. filed*, 66 U.S.L.W. 3137 (Aug. 6, 1997).

The writ of certiorari should be granted to resolve this mature conflict between the circuit courts of appeals.

2. This Court's decisions in *Alexander v. Gardner-Denver Co.* and *Gilmer v. Interstate/Johnson Lane Corp.* require that statutory discrimination claims be submitted to a court, unless the employee personally waives his right to a judicial trial.

Few topics in modern law have so engaged the courts and public debate as the topic of arbitration -- both under collective bargaining agreements and in other areas.[7]

In 1974, this Court clearly decided in *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974), that an arbitration clause in a collective bargaining agreement did not bar an employee from pursuing a statutory claim under a federal employment discrimination statute. "Both rights have legally independent origins and are equally available to the aggrieved employee." 415 U.S. at 52.

One rationale for that decision was a skepticism about the adequacy of arbitration procedures for deciding statutory claims. But equally or more important, both in *Alexander* and cases that followed it, was the fact that the collective bargaining arbitration right was one controlled by the union rather than the individual employee. "A further concern is the union's exclusive control over the manner and extent to which an individual grievance is presented... [T]he interests of the individual may be subordinated to the interests of all employees in the bargaining unit." 415 U.S. at 58 n.17. This concern has been repeated again and again. *See Livadas v. Bradshaw*, 512 U.S. 107, 127 n. 21 (1994). *See also McDonald v. City of West Branch*, 466 U.S. 284, 291 (1984): "the union may present the employee's grievance less vigorously, or make different strategic choices, than would the employee." Or, as in this case, the union may take no grievance action at all in response to the employee's request.

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[7] Charles J. Coleman & Theodora T. Haynes, *Labor Arbitration: An Annotated Bibliography* (ILR Press: 1994), describes 1336 publications that discuss labor arbitration, not counting publications that address commercial arbitration of business disputes, or other forms of arbitration.

Alexander was followed by this Court, particularly in cases such as *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728 (1981)(contract providing for arbitration of "any controversy" between parties did not cover statutory claim)[8]; and *McDonald v. City of West Branch*, 466 U.S. 284 (1984).

Then, in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), this Court held that an individual who

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[8] The decision below also conflicts squarely with *Barrentine*. *Barrentine* relied on *Alexander* to hold that claims under the Fair Labor Standards Act were not subject to mandatory arbitration, even when the arbitration clause of the CBA used broad language to define its scope:

> Respondents [employers] ... note that the collective-bargaining agreement between Arkansas-Best and petitioners' union requires that "any controversy" between the parties to the agreement be resolved through the binding contractual grievance procedures.... We reject this argument. 450 U.S. at 736-37.

In conflict with *Barrentine*, but without reference to it, the court of appeals held that the Bargaining Agreement had to be applied to statutory claims because the arbitration clause covered "all matters" regarding "terms and conditions of employment." App. at 5a. In *Austin*, the Fourth Circuit held that *Barrentine* had no relevance to employment discrimination claims because *Barrentine* involved FLSA claims. 78 F.3d at 883 n.2

personally agreed to resolve statutory claims by arbitration could be barred by such agreement from suing in a court to enforce the statutory claim. At the same time, this Court took pains to reaffirm and distinguish *Alexander* and its progeny:

> First, ... [s]ince the employees there had not agreed to arbitrate their statutory claims, and the labor arbitrators were not authorized to resolve such claims, the arbitration in those cases understandably was held not to preclude subsequent statutory actions. Second, because the arbitration in those cases occurred in the context of a collective-bargaining agreement, the claimants there were represented by their unions in the arbitration proceedings. An important concern therefore was the tension between collective representation and statutory rights, a concern not applicable to the present case. Finally, those cases were not decided under the FAA, which, as discussed above, reflects a "liberal federal policy favoring arbitration agreements." 500 U.S. at 35.

Since *Gilmer*, this Court has reiterated the continuing life of *Alexander*, in *Livadas v. Bradshaw*, 512 U.S. at 127 n.21.

Now all these cases -- *Alexander, Barrentine, McDonald*, and *Livadas* -- are dead letters in the Fourth Circuit, as this case plainly shows.

In this case, every factor that this Court has said distinguishes *Alexander* from *Gilmer* points to following *Alexander*. Instead, the court of appeals disposed of this case by citing its earlier holding in *Austin v. Owens-Brockway Glass Container*, 78 F.3d 875 (4th Cir. 1996):

> "In Austin, this Court established that collective bargaining agreements to arbitrate employment disputes are binding upon individual employees even when the dispute involves a federal cause of action." App. at 4a.

The rule "established" in *Austin* is flatly contrary to *Alexander*. Yet, far from giving this Court's decision in *Alexander* a decent burial, the majority of the panel in *Austin* addressed *Alexander* only in a footnote. 78 F.3d 883 n.2. The majority acknowledged that "This case arises in the context of a collective bargaining agreement, so there may be concern for any tension between collective representation and individual rights." The majority dismissed this concern because "Miss Austin is a party to a voluntary agreement which has explicitly agreed to the arbitration of her statutory complaints. That [agreement] should be enforced." The majority finally observed that "although we do not rely on the FAA in this case,[9] we do rely on the federal labor law policy encouraging arbitration of labor disputes as expressed in the *Steelworkers Trilogy*." *Idem*.

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[9] See 78 F.3d at 879. Petitioner worked in the longshore industry, physically moving goods in interstate and foreign commerce. Therefore, § 1 of the Federal Arbitration Act excludes the agreement from coverage of the F.A.A. See, e.g., *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 357 (7th Cir.), *cert. denied*, 66 U.S.L.W. 3277, 3281 (1997); *Cole v. Burns Int'l Security Services*, 105 F.3d 1465, 1469 (D.C. Cir. 1997).

Austin's abbreviated discussion of *Alexander* reflected confusion about basic principles of labor-management law. Individual workers are never "parties" to a bargaining agreement. It is the union, not the individual employee, that controls the assertion of grievances. Further, a "labor dispute" is, in essence, a dispute about *collective* rights. Even a grievance on behalf of an individual worker is a collective dispute, which the union evaluates and acts upon in accordance with the significance of that worker's grievance to the collective rights of workers. When a grievance involves enforcement of rights derived from the CBA -- rights obtained through bargaining and subject to majority approval -- this Court's decisions (such as the *Steelworkers Trilogy*) grant wide latitude to the union to pursue or abandon the enforcement of such contract rights. The *Austin* majority confused a "labor dispute" with an individual worker's claim under a statute prohibiting employment discrimination.

The collective rights exercised by labor unions under bargaining agreements stand on a completely different footing from individual employees' rights under federal statutes. Under this Court's decisions, individual rights conferred by federal statutes cannot be subordinated to the majoritarian processes that decide which rights to enforce collectively. Judge K.K. Hall, dissenting in *Austin*, understood this point clearly. The *Austin* majority's failure to understand it is at the root of the errors committed by the Fourth Circuit, both in *Austin* and in this case.

The writ of certiorari should be granted to address the conflict between the foregoing decisions of this Court and the decision below.

3. The decision below ignores settled precedent on an important question that constantly confronts both lay parties and federal courts.

In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991)(see *supra* at 15), this Court carefully preserved the distinction between labor arbitration and other arbitration in enforcing federal statutory rights. The endorsement by the overwhelming majority of the courts of appeals for this Court's reasoning in *Alexander* demonstrates its continuing soundness.

Congress has attempted to create a "user-friendly" administrative system for the assertion of rights under these statutes, through the Equal Employment Opportunity Commission, to enable lay employees to present these claims initially, without the assistance of attorneys. *Zipes v. TransWorld Airlines, Inc.*, 455 U.S. 385, 397 (1982), and *Love v. Pullman Co.*, 404 U.S. 522, 527 (1972). These important objectives are well served by simplicity and stability in the procedures for asserting claims.

Alexander v. Gardner-Denver Co. had been the law for 22 years before the Fourth Circuit's decision in *Austin*. Not only was the rule well settled, but it was fair and easy for lay persons to understand: if the employee has a right conferred by a collective bargaining agreement, it can only be enforced by asking the union to invoke the proper procedures under that agreement; but if the employee has statutory rights (under any federal or state statute), those rights may be independently enforced through the EEOC and the courts. The *Austin/Brown* approach unsettles established law in a most confusing manner.

The Fourth Circuit's decision in this case, following *Austin*, purported to apply *Gilmer* to collective bargaining agreements. In fact, the *Austin* doctrine, as applied both in *Austin* and in this case to bar any hearing whatsoever on statutory claims, creates a revolutionary restriction on enforcing statutory rights that goes far beyond *Gilmer*.[10]

In *Gilmer*, the employer only sought an order that the claim be heard on the merits in arbitration; it made no attempt to bar a hearing. Here, even though Petitioner filed the statutory claim with the EEOC within 15 days, the Fourth Circuit has allowed Petitioner's employers to avoid any hearing on the merits.

In *Gilmer* this Court emphasized that "[b]y agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." 500 U.S. at 26. Arbitration can only be compelled "[S]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, [so that] the statute will continue to serve both its remedial and deterrent function." *Gilmer*, 500 U.S. at 28, see *Austin*, 78 F.3d at 882.

Petitioner's case is typical of the upside-down application of *Gilmer* in the Fourth Circuit. Petitioner could not "effectively vindicate" his statutory cause of action because: (a) the union directed Petitioner to enforce his rights by other means, which the Fourth Circuit held to be ineffective; (b) the stated time for filing the grievance had expired before Petitioner employed an attorney, only 15 days after Respondents refused to accept Petitioner for work; and (c) the court below refused to retain jurisdiction, which prevented any judicial review, in conflict with *Gilmer's* requirement that judicial review be "sufficient to ensure that arbitrators comply with the requirements of the statute." 500 U.S. at 32 n.4.

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[10] On a number of recent occasions, this Court has unanimously corrected decisions by the Fourth Circuit that curtail rights under employment discrimination statutes. See, e.g., *Robinson v. Shell Oil Co.*, 117 S.Ct. 843 (1997); *O'Connor v. Consolidated Coin Caterers Corp.*, 116 S.Ct. 1307 (1996).

Thus, although the Fourth Circuit in *Austin* acknowledged and quoted the relevant principles from *Gilmer*, the court below has systematically applied *Austin*, not to assure that the statutory claims can be "effectively vindicated" in arbitration, but to assure that the statutory claims will never be heard anywhere on the merits. This distorts the ruling in *Gilmer* that employees must arbitrate certain disputes. It also has created much litigation on an issue where *Alexander*'s "bright-line" rule had guided everyone for more than twenty years of settled practice.

The Fourth Circuit's revolutionary restriction on enforcement of statutory rights presents an extremely important question that this Court will have to resolve some day. There will never be a better time.

CONCLUSION

The decision below conflicts with the decisions of every other appellate court that has considered the issue. Only in the Fourth Circuit is an employee who works under a collective bargaining agreement denied the right to take his statutory claims of discrimination to the federal court. Only in the Fourth Circuit will a worker who is represented by a union completely forfeit his statutory discrimination claim if the union chooses not to pursue it. The writ of certiorari should be granted to resolve this conflict, so that unionized workers everywhere in the nation have the same protections under federal anti-discrimination statutes.

Respectfully submitted,

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Charleston, South Carolina
November 25, 1997

Appendix

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

CEASAR WRIGHT,)
)
Plaintiff-Appellant,)
v.)
UNIVERSAL MARITIME SERVICE)
CORPORATION; STEVENS SHIPPING &)
TERMINAL COMPANY; STEVEDORING) No. 96-2850
SERVICES OF AMERICA; RYAN-)
WALSH, INCORPORATED; STRACHAN)
SHIPPING COMPANY; CERES MARINE)
TERMINALS, INCORPORATED; SOUTH)
CAROLINA STEVEDORES)
ASSOCIATION,)
)
Defendants-Appellees.)
)

Appeal from the United States District Court
for the District of South Carolina, at Charleston.
David C. Norton, District Judge.
(CA-96-165-2-18-AJ)

Argued: July 7, 1997

Decided: July 29, 1997

Before WILKINSON, Chief Judge, and WILKINS and
HAMILTON, Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Ray P. McClain, Charleston, South Carolina, for Appellant. Charles Archibald Edwards, Raleigh, North Carolina, for Appellees. **ON BRIEF:** Jeffrey M. Hahn, Raleigh, North Carolina, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Ceasar Wright sued the South Carolina Stevedores Association ("SCSA") and six of its individual members alleging violations of the Americans with Disabilities Act. The district court, relying on Austin v. Owens-Brockway Glass Container, 78 F.3d 875 (4th Cir. 1996), dismissed the case because Wright had failed to submit his claim to arbitration as required by the collective bargaining agreement ("CBA") between the SCSA and Wright's union. On appeal, Wright argues that Austin is inapplicable because the CBA here does not specifically address ADA claims. This contention is meritless. An arbitration agreement need not list every possible dispute between the parties in order to be binding. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991). To hold otherwise would directly contradict Supreme Court precedent and the strong federal policy favoring arbitration. Accordingly, we affirm the judgment of the district court.

I.

Ceasar Wright worked as a longshoreman in Charleston, South Carolina[,] from 1970 to 1992. On February 18, 1992, he was injured at work. Consequently, Wright filed suit for benefits under the Longshore and Harbor Workers' Compensation Act, and his employer, Stevens Shipping Company, settled the claim for $250,000. During the course of this suit, Wright represented that he had been totally and permanently disabled.

On January 2, 1995, Wright appeared at the hiring hall of the Local 1422 of the International Longshoreman's Association ("the union"), claiming that he was ready and able to return to work. Wright presented a note from his physician, Dr. Howard Brilliant, which stated that he could return to full duty.

From January 2 through January 11, 1995, the union referred Wright to four different stevedoring contractors. Initially, none of these employers objected to Wright's work. However, when the companies discovered that Wright had earlier received a settlement for total and permanent disability, they, both individually and acting through their multi-employer collective bargaining representative the SCSA, advised the union that Wright would no longer be accepted for employment referral. The SCSA maintained that under the CBA, Wright was not qualified to work due to his total and permanent disability.

The union responded with a letter disputing the SCSA's interpretation of the CBA. However, neither Wright nor the union ever filed a formal grievance under the CBA's arbitration procedure, and the union advised Wright to pursue a statutory claim under the Americans with Disabilities Act. Wright then filed this suit against the SCSA and six of its individual members.

The case was referred to a magistrate judge who, citing Austin v. Owens-Brockway Glass Container, 78 F.3d 875 (4th Cir. 1996), recommended the case be dismissed because Wright had failed to submit his claim to arbitration as required by the CBA. The district court adopted this position over Wright's objections. Wright now appeals.

II.

In Austin, this court established that collective bargaining agreements to arbitrate employment disputes are binding upon individual employees even when the dispute involves a federal cause of action. 78 F.3d at 885. Where such an agreement exists, a failure to process a claim under the agreement precludes a court from exercising jurisdiction over the merits of the claim. Id. Wright did not submit his claim to arbitration. Thus, under Austin, the only issue in this case is whether there was an agreement to arbitrate ADA claims in the CBA between Wright's union and the SCSA.

The arbitration clause at issue is particularly broad. The clause states that the "Union agrees that this Agreement is intended to cover all matters affecting wages, hours, and other terms and conditions of employment." However, Wright contends that since the agreement does not specifically address ADA claims it cannot be binding here.

We are unpersuaded. An employer need not provide a laundry list of potential disputes in order for them to be covered by an arbitration clause. For example, in Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991), the Supreme Court held that a plaintiff was required to submit his ADEA claim to arbitration where the arbitration agreement covered "any dispute, claim or controversy." Id. at 23. The language of the CBA at issue in this case is equally broad, covering "all matters" regarding "terms and conditions of employment." This language easily encompasses Wright's ADA claim. A narrower interpretation of the agreement would fly directly in the face of both the ADA's statutory preference for arbitration, 42 U.S.C. § 12212, and the strong federal policy favoring alternative dispute resolution, see Moses H. Cone Memorial Hospital v. Mercury Construction Co., 460 U.S. 1, 24-25 (1983).

Under Austin, Wright must submit his claim to arbitration. Wright, however, contends that we should remand this case so that the district court may retain jurisdiction to monitor the arbitration process. We decline this invitation. Austin does not require a district court to retain jurisdiction once a case is dismissed for failure to exercise arbitral remedies. Indeed, the district court precisely followed Austin's instruction that a claim that has not been properly submitted to arbitration should be dismissed without prejudice and without any opinion on "the merits of the claim, or whether or not the same is subject to arbitration." 78 F.3d at 886. Those issues are for the arbitrators, and the district court's disposition of this case was entirely proper.

III.

For the foregoing reasons we affirm the judgment of the district court.

AFFIRMED

[FILED
SEP 27 1996
LARRY W. PROPES, CLERK
CHARLESTON, SC]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
[CHARLESTON] DIVISION

Ceasar Wright,)
)
Plaintiff,) C/A No. 2:96-0165-18AJ
)
vs.)
)
Universal Maritime Service)
Corp.; Stevens Shipping &)
Terminal Company;) **ORDER**
Stevedoring Services of)
America; Ryan-Walsh, Inc.;)
Strachan Shipping Company;)
Ceres Marine Terminals, Inc.;)
and South Carolina)
Stevedores Association,)
)
Defendants.)
)

This matter is before the court upon the magistrate judge's recommendation that the above-captioned case be dismissed *without prejudice.* The magistrate judge makes this recommendation because he determined this court lacks jurisdiction to adjudicate Plaintiff's employment discrimination claim.

I. TIME FOR FILING OBJECTIONS

A petitioner may object, in writing, to a magistrate judge's report within ten days after being served with a copy of that report. 28 U.S.C. §636(b) (1). Three days are added to the ten day period if the recommendation is mailed rather than personally served. The magistrate judge's report and recommendation was filed on June 14, 1996. Plaintiff filed his timely written objections with the court on June 27, 1996. Defendants filed a response to Plaintiff's objections on July 9, 1996.

II. REVIEW OF MAGISTRATE JUDGE'S REPORT

This court is charged with conducting a *de novo* review of any portion of the magistrate judge's report to which a specific objection is registered and may accept, reject, or modify, in whole or in part, the recommendations contained in that report. 28 U.S.C. § 636(b)(1). A review of the record and Plaintiff's objections indicates that the magistrate judge's report accurately summarizes this case and the applicable law. Accordingly, the magistrate judge's report is incorporated into this order.

The magistrate judge determined that Plaintiff had not followed the grievance procedures established by the applicable collective bargaining agreement. The rule of the Supreme Court and this circuit is that an employee must follow the grievance procedure established by the collective bargaining agreement prior to filing suit in federal court. *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652, 85 S.Ct. 614, 616 (1965); *Adkins v. Times-World Corp.*, 771 F.2d 829, 832 (4th Cir. 1985), *cert. denied*, 474 U.S. 1109, 106 S.Ct. 896 (1986); *see also* *Austin v. Owens-Brockway Glass*, 78 F.3d 875 (4th Cir. 1996) (finding plaintiff was precluded from bringing lawsuit because his complaint was subject to mandatory arbitration which he bypassed). The magistrate judge concluded Plaintiff's complaint was subject to mandatory arbitration under the terms of the bargaining agreement and, thus, that this court lacks jurisdiction to hear the case.

This court is charged with conducting a de novo review of any portion of the magistrate judge's report to which a specific objection is registered. 28 U.S.C. § 636(b)(1) (emphasis added). Plaintiff's objections regurgitate virtually, if not completely, verbatim his arguments in his motion for partial summary judgment. As noted, the magistrate judge accurately summarized this case and the applicable law. Therefore, most of Plaintiff's objections have already been addressed.

As the magistrate judge concluded, arbitration applies to Plaintiff's claims. In reaching his conclusion, he relied heavily on the reasoning in the Austin case. Plaintiff objects to the reliance upon Austin, arguing that the case is distinguishable from this action.

Specifically, Plaintiff argues that the collective bargaining agreement in Austin contained a specific nondiscrimination clause listing "gender and disability discrimination claims as claims that are subject to arbitration." (Objection, p. 6). Plaintiff also argues that the Austin contract contained an obligation to administer the contract "in accordance with the applicable provisions of the Americans with Disabilities Act." (Objection, p. 6). Unlike Austin, contends Plaintiff, the collective bargaining agreement has no provision guaranteeing nondiscrimination and only contains language that no provision or part of the agreement shall be violative of any Federal or State law.

Austin, in fact, involved a specific nondiscrimination provision and referenced the Americans with Disabilities Act.

However, there is no requirement that the specific statu[t]e involved must be named for the arbitration bar to apply. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 111 S. Ct. 1647 (1991). In Gilmer, the decision upon which Austin was based, the court determined that plaintiff's ADEA claims were barred because of the failure to arbitrate them. There was no reference to the ADEA in the arbitration agreement at issue.

Despite Plaintiff's attempt to differentiate Austin from this action, this court cannot overlook the overriding federal policy favoring arbitration. See American Recovery Corp. v. CTI, [96] F.3d [88] (4th Cir. 1996) (citing Moses H. Cone Memorial Hosp. v. Mercury Constr. Co., 460 U.S. 1, 24-25). The CTI case involved a consulting agreement that contained an arbitration clause. The court's discussion before finding that plaintiff's claims were arbitrable under the agreement is enlightening.

> ...'[A]s a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.' Moses H. Cone Memorial Hosp. v. Mercury Constr. Co., 460 U.S. 1, 24-25 (1983). 'To that end, the heavy presumption of arbitrability requires that when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration.' Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co., 867 F.2d 809, 812 (4th Cir. 1989). Thus, we may not deny a party's request to arbitrate an issue 'unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.' Warrior & Gulf Navigation Co., 363 U.S. at 582-823.

CTI, [96] F.3d [88]. As noted, Plaintiff objects that the bargaining agreement at issue is not as specific concerning disability discrimination as the one [in] Austin and that an Austin analysis should not apply. Even if this court did not agree with the magistrate judge's analysis under Austin, it would be compelled to rule in favor of arbitration given the Fourth circuit's decision in CTI. The arbitration provision in this case, mandating that no provision or part of the agreement be violative of any federal or State law, is easily "susceptible of an interpretation" that it covers Plaintiff's disability discrimination claims. Thus, this court agrees with the magistrate judge's conclusion that the arbitration agreement should be enforced.

The magistrate judge did not specifically address Plaintiff's argument that the Austin decision should not be applied retroactively. Plaintiff asserts in one line in his objection that Austin "can only be applied *prospectively,* under the three-factor analysis in *Chevron Oil Co. v. Huson,* 404 U.S. 97, 106-07 (1971)."

Austin can be applied retroactively. The general rule in American jurisprudence is that judicial decisions are to be applied retroactively. Cash v. Califano, 621 F.2d 626, 628 (4th Cir. 1980). This is necessarily so for the parties before the court and implicitly so for all other potential litigants. Id. A corollary of this proposition is the rule that a court will apply judicial case law as that law exists at the time of its decision. Id. Although retroactive application is the norm, some cases are applied prospectively. The party seeking to have a court adopt a rule of nonretroactivity in a particular case has the burden of presenting an equitable reasons [*sic*] to overcome the norm. Id. Courts enter a three-factor analysis in determining

whether there should be prospective application only.[1] Id. (citing Chevron Oil Co. v. Huson, 404 U.S. 97, 92 S. Ct. 349 (1971)).

Austin itself was applied retroactively. In its Austin decision, the Fourth Circuit did not make any finding that it would be impermissible under Chevron to apply its decision retroactively, and instead applied the decision to dismiss plaintiff's claim. If the Austin court applied its decision retroactively to the parties before it, implicitly the decision should be applied retroactively to cases pending at the time of the decision.

Under the Chevron analysis, Austin did not establish a new legal principle. It did not overrule clear past precedent on which the parties may have relied nor was it a case of first impression, resolution of which was not foreshadowed in earlier cases. If anything, Austin clarified earlier precedent, namely Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991). In fact, the Fourth Circuit relied heavily on Gilmer in reaching its conclusions in Austin. Gilmer provided that once parties have contracted to arbitrate a statutory matter, the parties should be held to that agreement unless Congress intended to prohibit arbitration of that matter. Gilmer, 500 U.S. at 26. The Austin court concluded that under the Civil Rights Act and the Disabilities Act Congress intended to encourage rather than prohibit arbitration. Thus, the parties were held to their agreement to arbitrate the discrimination dispute.

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[1] The three factors are: (1) whether the decision established a new legal principle by overruling clear past precedent on which litigants may have relied or by deciding a case of first impression, resolution of which was not clearly foreshadowed in earlier cases; (2) whether retroactive application may further the application of the rule; and (3) whether the decision could produce substantial inequitable results if applied retroactively. Chevron Oil Co. v. Huson, 404 U.S. 97, 106-07 (1971).

Plaintiff takes issue with the specific language in the arbitration agreement. As noted above, Gilmer contained no reference to federal and state laws, as the bargaining agreement in this case does. Because it appears Austin was a continuation of Gilmer and its progeny, Plaintiff cannot show that clear past precedent upon which he relied has been overruled.

Second, retroactive application will further, not retard, application of the rule. As noted, Austin is a continuation of cases encouraging arbitration of disputes when parties have agreed to do so.

Finally, a retroactive decision would not produce inequitable results. Plaintiff has not presented any equitable reason for a prospective application only of Austin, other than stating that applying Austin retroactively "would plainly be inequitable." (Plaintiff's Motion for Partial Summary Judgment, p. 18). The parties agreed to arbitrate their disputes. Application of Austin merely requires them to do so.

The Supreme Court has approved retroactive application of new case law holding a claim to be barred by an agreement to arbitrate. See Rodriguez de Ouijas v. Shearson/American Exp. Inc., 490 U.S. 477 (1989). In Rodriguez de Ouijas, the Supreme Court upheld enforcement of an agreement to arbitrate a dispute that otherwise would have been actionable under the Securities Act of 1933. Applying Chevron Oil, the Court held that its new principle of law for arbitration agreements under the Securities Act should be applied retroactively. Rodriguez de Ouijas, 490 U.S. at 485.

Plaintiff also contends that the collective bargaining agreement cannot limit his time to file his discrimination grievance to 48-hours. However, parties can contract for shorter limitations periods. See Lockheed Corp. v. Spink, ___ U.S. ___, 116 S. Ct. 1783 (1996) (agreeing that an employer

can protect itself from suits by offering incentives conditioned upon the release of claims against the employer); Austin, 78 F.3d at 880 (finding plaintiff's ADA claim to be barred by the failure to arbitrate under provision requiring a request for arbitration within 10 days of the grievance panel decision).

Plaintiff's argument that the 48-hour limit on grievances contravenes the statutory policy of the Americans with Disabilities Act, which sets the statute of limitations at no less than 180 days, is interesting. However, Plaintiff has made no attempt to pursue the grievance procedures under the collective bargaining agreement. As the magistrate judge noted, the question whether arbitration may now be available or the result thereof is not before the court. (Report and Recommendation, p. 8). Thus, it is not appropriate for Plaintiff to question the limitation period at this time.

III. CONCLUSION

For the reasons set forth in detail by the magistrate judge, it is therefore,

ORDERED that Respondents' Motion for Summary Judgment be **GRANTED** and this action be **DISMISSED** *without prejudice*,

IT IS SO ORDERED.

/s/

DAVID C. NORTON
UNITED STATE DISTRICT JUDGE

Charleston, South Carolina
September [27], 1996

[FILED
DEC 5 - 1996
LARRY W. PROPES, CLERK
CHARLESTON, SC]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA [CHARLESTON] DIVISION

Ceasar Wright,)
)
Plaintiff,) C/A No. 2:96-0165-18AJ
)
vs.)
)
Universal Maritime Service)
Corp.; Stevens Shipping &)
Terminal Company;) **ORDER**
Stevedoring Services of)
America; Ryan-Walsh, Inc.;)
Strachan Shipping Company;)
Ceres Marine Terminals, Inc.;)
and South Carolina)
Stevedores Association,)
)
Defendants.)
)

This matter is before the court upon Plaintiff's Motion to Vacate or to Reconsider this court's September 27, 1996[,] order granting summary judgment to Defendants.

A motion to vacate or for reconsideration filed pursuant to Federal Rule of Civil Procedure 59(e) allows a losing party to seek the trial court's reconsideration of its order granting summary judgment. Ford Motor Credit Co. v. Bright, 34 F.3d 322 (5th Cir. 1994); Fed.R.Civ.P. 59(e). The trial court exercises its discretion when reviewing the record and considering a motion to vacate. Id. at 324; see Barton v. Sindall Transport, Inc., 934 F.2d 318, 1991 WL 87206 (4th Cir. 1991).

Plaintiff first disputes this court's reliance on Austin v. Owens-Brockway Glass Container, 78 F.3d 875 (4th Cir. 1996), in granting Defendants' Motion for Summary Judgment. He argues that this court is order should be vacated and a decision deferred until the Supreme Court concludes any review of Austin. On November 12, 1996, the United States Supreme Court denied certiorari in Austin v. Owens-Brockway Glass Container, [117] S.Ct. [432], 1996 WL 514567 (Nov. 12, 1996). Accordingly, Plaintiff's first argument is moot.

In his second argument, Plaintiff essentially argues that the 48-hour arbitration provision is in contravention of the 180-day (300-day in South Carolina) time limit provided for in the ADA. Plaintiff asserts that this court erroneously refused to address his arguments with regard to the 48-hour time period because it believed Plaintiff had not attempted to submit his dispute to arbitration.

The arbitration provision does not limit to 48-hours the time in which a employee must file an age discrimination claim. The procedure provided for in the collective bargaining agreement initially requires an attempt by the union and the employer to informally resolve an employment dispute. (Longshoremen's Agreement, p. 27 at ¶ 15B). There is no time limit concerning this initial attempt at resolution. It is not until the matter cannot be resolved that it must be submitted in writing within 48-hours to a grievance committee.[1] (Longshoremen's Agreement, p. 27 at ¶ 15B). This court is not convinced that this procedure unduly limits the time in which an employee has to bring an employment discrimination claim.

Both parties agree that Plaintiff initially followed the proper procedure under the collective bargaining agreement for filing a grievance against Defendants. Plaintiff 's union raised the issue concerning Plaintiff's denial of employment with Defendants: "If Caesar Wright is proven to have limited disability and he returns to work and can perform his duties, I believe Federal Laws protect his right to do so under the 'American[s] with Disability Act.'" (January 12, 1995[,] letter from Benjamin Flowers, Union President). However, the dispute was not resolved. Under the collective bargaining agreement, the proper procedure at that point would have been for the union to reduce Plaintiff's grievance to writing within 48 hours and submit it to the Port Grievance Committee. Instead, the union did not pursue the matter, and Plaintiff initiated a complaint with the Equal Employment Opportunity Commission. Plaintiff contends that the union recommended he pursue his statutory remedies under the ADA rather than arbitrate the dispute.

Plaintiff's dispute should have been submitted to a grievance committee to be resolved. However, Plaintiff argues that neither he nor the union knew, until the Fourth Circuit's decision in Austin, that ADA claims would be covered under the collective bargaining agreement arbitration provision. This court disagrees, as discussed below, that Austin changed the prior law allowing parties to agree to arbitrate federal statutory claims.

Plaintiff's final argument is that Austin should not be applied retroactively because it changes prior law and shortens the statute of limitations for bringing an age discrimination claim. This court properly analyzed the Chevron Oil factors in determining that Austin is to be applied retroactively. Austin provides that federal statutes like the Civil Rights Act and the ADA do not prohibit agreements to arbitrate disputes under them. However, this does not, as Plaintiff argues, change previous law. For example, Austin relied on prior decisions such as Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991), in which the United States Supreme Court made clear that agreements to arbitrate statutory claims are enforceable. This court finds untenable Plaintiff's position that, prior to Austin, he and his union were unaware that parties can agree to submit federal statutory claims to arbitration.

Here, the collective bargaining agreement specifically states that "[i]t is the intention and purpose of all parties hereto that no provision or part of this Agreement shall be violative of any Federal or State Law." (Longshoremen's Agreement, p. 35 at ¶ 17). Plaintiff and his union, through the collective bargaining agreement, were obligated to submit ADA and other claims to the grievance procedure.

Furthermore, Austin does not mandate a particular time period in which a plaintiff must submit his case to arbitration. In fact, the court in Austin specifically declined to address whether arbitration was then available to the plaintiff under a provision requiring disputes to be submitted to arbitration within ten days because that issue was not before the court. Austin, 78 F.3d at 886.

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[1] The grievance procedure involves several possible stages. If the initial grievance committee cannot resolve the dispute, it goes to a second grievance committee, then to arbitration. When this court refers to the "arbitration provision" in the collective bargaining agreement, it is referring to the grievance procedure provision.

As indicated above, Plaintiff's claim should have been submitted to a grievance committee pursuant to the arbitration provision. For whatever reason, his union chose not to pursue his claim.[2] Because the grievance procedures were not followed, this court granted Defendants' Motion for Summary Judgment and dismissed the case *without prejudice*. This court will not vacate its order granting summary judgment to Defendants.

It is therefore,

ORDERED that Plaintiff's Motion Vacate or Reconsider be **DENIED.**

IT IS SO ORDERED.

[S/]

DAVID C. NORTON
UNITED STATES DISTRICT JUDGE

Charleston, SOUTH Carolina
December [5], 1996

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[2] This court is well aware of the line of cases allowing an employee to bring a civil action without first pursuing contractual arbitration requirements when his union does not fairly represent his interests. See DelCostello v. Teamsters, 462 U.S. 151 (1983); Hines v. Anchor Motor Freight, Inc, 424 U.S. 554 (1976); and Vaca v. Sipes, 386 U.S. 171 (1967). However, Plaintiff has not demonstrated, or even argued, that the union handled his grievance only perfunctorily or in bad faith, nor is there substantial reason to believe that a union breach of duty contributed to an erroneous outcome in the contractual grievance proceedings. See Hardee v. North Carolina Allstate Services, Inc., 537 F.2d 1255, 1258 (4th Cir. 1976) (citing Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976)).

[FILED
JUN 14 1996
LARRY W. PROPES, CLERK
CHARLESTON, SC]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

CEASAR WRIGHT,) C. A. No. 2:96-0165-18AJ
)
Plaintiff,)
)
-versus-) **REPORT AND**
) **RECOMMENDATION**
UNIVERSAL MARITIME)
SERVICE CORP.;)
STEVENS SHIPPING &)
TERMINAL COMPANY;)
STEVEDORING SERVICES)
OF AMERICA;)
RYAN-WALSH, INC.;)
STRACHAN SHIPPING)
COMPANY; CERES)
MARINE TERMINALS,)
INC.; AND SOUTH)
CAROLINA STEVEDORES)
ASSOCIATION,)
)
Defendants.)
)

This action is before the undersigned United States Magistrate Judge for a report and recommendation on the plaintiff's motion for partial summary judgment and the defendants' motion for summary judgment. 28 U.S.C. § 636(b).

Caesar Wright (Wright) filed this employment discrimination action against his former employers on January 19, 1996. Wright alleged that the defendants, Universal Maritime Service Corp. (Universal), Stevedoring Services of America, Inc., Stevens Shipping Company (Stevens), Ryan-Walsh Inc., Strachan Shipping Company, Ceres Marine Terminals, Inc., and South Carolina Stevedores Association (SCSA)[1], (collectively defendants), violated his right to employment under the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101 et. seq. Following the close of discovery, Wright moved for partial summary judgment on May 3, 1996, on the defendants' affirmative defenses of arbitration, qualified person, estoppel by claim settlement, accord and satisfaction, estoppel by receipt of social security disability benefits, waiver, timeliness, and fraud. The defendants moved for summary judgment on that same day. The parties have responded to the opposing motions and oral argument before the undersigned was had on May 22, 1996. Hence, it appears consideration of the motions is appropriate.

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, (1986). A "genuine issue of material fact exists only where there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for

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[1] This defendant is the collective bargaining unit for the other defendants rather that an employer itself.

that party.'" Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S.Ct. 2505, 2510 (1986))*[sic]*. In considering such a motion, the court must view all inferences in the light most favorable to the nonmoving party. The court will enter summary judgment against a party who does not come forward with evidence that would reasonably permit a finder of fact to find in his or her favor on a material question. Once the moving party has supported its motion for summary judgment, any fact asserted in the movant's affidavit will be accepted by the court as true unless the adverse party submits his own affidavits or other admissible evidence contradicting the assertion. Fed.R.Civ.P. 56(e).

It is undisputed that Wright worked from 1970 through 1992 as a longshoreman at the Port of Charleston, South Carolina. On February 18, 1992, he sustained a serious injury to his right heel and back while working for defendant Stevens. Wright pursued a claim for disability compensation under the Longshore and Harbor Workers Compensation Act, 33 U.S.C. §901 et. seq. Pursuant to a settlement agreement, Stevens paid Wright $250,000.00 and paid $10,000.00 in Wright's legal expenses.

Wright did not work again until January 2, 1995, when his union referred him for work with Steven [*sic*] at Wright's request. Wright had obtained a written release to return to work from a treating physician, Dr. Howard Brilliant. Wright worked for each defendant for a period of one to four days until January 11, 1996. Wright performed his duties satisfactorily. Nonetheless, the general manager of Universal advised the union through Local 1422's president, Benjamin Flowers, that Wright would not be accepted in the future, and referenced various clauses of the collective bargaining agreement (CBA). (Stipulated doc. 21). Defendant SCSA confirmed the denial of employment to Benjamin Flowers. Wright himself contacted the union to complain that he had been refused work. On January 12, 1996, Benjamin Flowers wrote Universal and copied SCSA to express his disagreement with their interpretation of the portions of the CBA they relied upon and to protest what he referred to as a "lock-out" in violation of yet another provision of the CBA. (Stipulated doc. 22).

The local did not pursue the matter, however. No grievance was filed, nor did the parties seek compulsory arbitration as required by the CBA, (CBA Section 15(B)[)], and instead Wright initiated a complaint with the Equal Employment Opportunity Commission, received a right to sue letter, and filed this action.

The defendants assert Wright is estopped from pursuing this action because he failed to comply with the terms of the CBA. It appears the defendants are partially correct. That default renders this court without jurisdiction to adjudicate Wright's claim.

On March 12, 1996, the Fourth Circuit decided Austin v. Owens-Brockway Glass, 78 F.3d 875 (4th Cir.1996), which is controlling here. In that case, the plaintiff attempted to sue her former employer for alleged violations of the ADA. The employer argued that the complaint should be dismissed because the plaintiff failed to use the grievance-arbitration procedure set forth in the collective bargaining agreement between the employer and the company union. The agreement provided that disputes under the CBA were to be governed by a grievance procedure which provided for the compulsory submission of all disputed claims to a neutral third party arbitrator whose decision was to be final and binding upon the parties. The CBA stated that "any disputes under this article ... shall be subject to the grievance procedure." Because plaintiff's complaint was subject to mandatory arbitration which the plaintiff bypassed, the court applied the holding in Gilmer v. Interstate Johnson Lane Corp., 500 U.S. 20, 111 S.Ct. 1647 (1991)[,] and its progeny to find that Ms. Austin was precluded from bringing the lawsuit. Further, the Fourth Circuit reasoned since a valid agreement to arbitrate future disputes effectively ousts a court of jurisdiction, it would not consider the remaining defenses raised at summary judgment. Austin at 878.

The Austin court reasoned:

> In deciding whether to enforce the arbitration provision in this collective bargaining agreement, we start with and rely upon the "well-recognized policy of federal labor law favoring arbitration of labor disputes." Adkins v. Times-World Corp., 771 F.2d 829, 831 (4th Cir. 1985), cert. denied, 474 U.S. 1109, 106 S.Ct. 896 (1986). In the Steelworkers trilogy, the Supreme Court established that arbitration is favored in labor disputes. See e.g., United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 80 S.Ct. 1358 (1960); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 80 S.Ct. 1347 (1960); United Steelworkers of America v. American Manufacturing Co., 363 U.S. 564, 80 S.Ct. 1343 (1960). We need not rely on the Federal Arbitration Act (FAA), 9 U.S.C. § 1 et seq., in this case because, in this circuit, the FAA is not applicable to labor disputes arising from collective bargaining agreements. Domino Sugar Corp. v. Sugar Workers Local Union 392, 10 F.3d 1064, 1067 (4th Cir. 1993) ....
>
> In Gilmer, the Supreme Court made clear that agreements to arbitrate statutory claims are enforceable. Gilmer, 500 U.S. at 26, 111 S.Ct. at 1652. The Gilmer Court recognized that arbitration of a statutory claim is not equal to giving up any right under a statute, it is

> simply another forum in which to resolve the dispute: [B]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. Gilmer, 500 U.S. at 26, 111 S.Ct. at 1652 (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628, 105 S.Ct. 3346, 3354 (1985)). Gilmer thus rejects the principal concern in Alexander v. Gardner-Denver Co., 415 U.S. 36, 94 S.Ct. 1011, (1974), that arbitration is an "inappropriate forum" for the resolution of Title VII statutory rights. Alexander, 415 U.S. at 56, 94 S.Ct. at 1023-24. Emphasizing its support of arbitration as a method of dispute resolution, the Gilmer Court stated: [A]ttacks on [the adequacy] of arbitration "res[t] on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants," and as such, they are "far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes." Gilmer, 500 U.S. at 30, 111 S.Ct. at 1654 (third alteration in original) (quoting Rodriquez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 481, 109 S.Ct. 1917, 1920 (1989).
>
> Gilmer further provides that once parties have contracted to arbitrate a statutory matter, the parties should be held to that agreement unless Congress intended to prohibit arbitration of that matter: "[H]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." ... If such an intention exists, it will be discoverable in the text of the [statute], its legislative history, or an "inherent conflict" between

> arbitration and the [statute's] underlying purposes. Gilmer, 500 U.S. at 26, 111 S.Ct. at 1652 (quoting Mitsubishi, 473 U.S. at 628, 105 S.Ct. at 3354-55). The language of the statutes could not be any more clear in showing Congressional favor towards arbitration. The Civil Rights Act of 1991, amending Title VII, states: Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including ... arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title. Pub.L. No. 102-166, § 118,105Stat.1071,1081[*sic*]. The Americans with Disabilities Act contains identical language: Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including ... arbitration, is encouraged to resolve disputes arising under this chapter. 42 U.S.C. § 12212. The meaning of this language is plain--Congress is in favor of arbitration.

Id. at 881.

The rule of the Supreme Court and this circuit is that an employee must follow the grievance procedure established by the CBA prior to filing suit in federal court, Republic Steel Corp. v. Maddox, 379 U.S. 650, 652, 85 S.Ct. 614, 616 (1965), Adkins v. Times-World Corp., 771 F.2d 829, 832 (4th Cir. 1985), cert. denied, 474 U.S. 1109, 106 S.Ct. 896 (1986). Thus, an employee cannot sue an employer without first going through the grievance procedure, and this is what the plaintiff is attempting to do here. He is a party to a voluntary agreement to submit employment claims to arbitration. The CBA is consistent with the text of the ADA, the legislative intent behind the statute, and the purposes of those statutes. Congress did not intend to preclude arbitration of claims under the ADA.

Austin at 885, 886. The arbitration agreement should be enforced. The question of whether arbitration may now be available or the result thereof is not before the court. Since it appears the court lacks jurisdiction, the dismissal of the case should be without prejudice to the merits of the claim asserted.

Accordingly, it is recommended that this action be dismissed without prejudice for want of jurisdiction.

Respectfully submitted,

/s/
Robert S. Carr
United States Magistrate Judge

Charleston, South Carolina
June 14, 1996

STATUTORY PROVISIONS INVOLVED

§ 2000e-5 Enforcement provisions

* * *

(f) Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judge to hear and determine case; assignment of case for hearing; expedition of case; appointment of master

(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections (c) or (d) of this section or further efforts of the commission to obtain voluntary compliance.

* * *

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter.

Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of Title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

* * *

§ 12102. Definitions

(2) Disability

The term "disability" means, with respect to an individual --

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

* * *

§ 12111. Definitions

As used in this subchapter:

* * *

(2) Covered entity

The term "covered entity" means an employer, employment agency, labor organization, or joint labor-management committee.

* * *

(4) Employee

The term "employee" means an individual employed by an employer. With respect to employment in a foreign country such term includes an individual who is a citizen of the United States.

(5) Employer

(A) In general

The term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this subchapter, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar week in the current or preceding year, and any agent of such person.

* * *

(8) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

* * *

§ 12112. Discrimination

(a) General rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction

As used in subsection (a) of this section, the term "discriminate" includes --

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

(3) utilizing standards, criteria, or methods of administration --

(A) that have the effect of discrimination on the basis of disability; or

(B) that perpetuate the discrimination of others who are subject to common administrative control;

* * *

§ 12117. Enforcement

(a) Powers, remedies, and procedures

The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment.

* * *

§ 12212. Alternative means of dispute resolution

Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under this chapter.

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78 F.3d 875
64 USLW 2586, 151 L.R.R.M. (BNA) 2673, 70 Fair Empl.Prac.Cas. (BNA) 272, 67 Empl. Prac. Dec. P 43,970, 5 A.D. Cases 488, 15 A.D.D. 166, 7 NDLR P 394
(Cite as: 78 F.3d 875)

Linda AUSTIN, Plaintiff-Appellant,
v.
OWENS-BROCKWAY GLASS CONTAINER, INCORPORATED, Defendant-Appellee.
Equal Employment Opportunity Commission; Equal Employment Advisory Council, Amici Curiae.
Linda AUSTIN, Plaintiff-Appellee,
v.
OWENS-BROCKWAY GLASS CONTAINER, INCORPORATED, Defendant-Appellant.
Equal Employment Opportunity Commission; Equal Employment Advisory Council, Amici Curiae.

Nos. 94-1213, 94-1265.

United States Court of Appeals,
Fourth Circuit.

Argued Feb. 3, 1995.

Decided March 12, 1996.

Discharged employee brought action against her former employer for violating Title VII and Americans with Disabilities Act (ADA) by terminating her while she was on medical leave and receiving workers' compensation benefits and not reassigning her to light-duty work when she was able to return to work. The United States District Court for the Western District of Virginia, Jackson L. Kiser, Chief Judge, 844 F.Supp. 1103, granted summary judgment for employer, and employee appealed. The Court of Appeals, Widener, Circuit Judge, held that: (1) employee had standing under collective bargaining agreement (CBA) to arbitrate her dispute after being discharged; (2) arbitration of employee's Title VII and disability claims was mandatory under CBA; (3) agreement to arbitrate ADA and Title VII statutory claims was enforceable; and (4) employee could not sue employer before pursuing arbitration of her discrimination claims.

Affirmed as modified and remanded.

K.K. Hall, Circuit Judge, filed dissenting opinion.

*877Appeals from the United States District Court for the Western District of Virginia, at Danville. Jackson L. Kiser, Chief District Judge. (CA-93-51- D).

ARGUED: Barbara Rubin Hudson, Danville, Virginia, for Appellant. Karen Marie Moran, Office of General Counsel, Equal Employment Opportunity Commission, Washington, DC, for Amicus Curiae EEOC. Thomas Michael Lucas, Mary Chapman Hamilton, Vandeventer, Black, Meredith & Martin, Norfolk, Virginia, for Appellee. **ON BRIEF**: James R. Neely, Jr., Deputy General Counsel, Gwendolyn Young Reams, Associate General Counsel, Vincent J. Blackwood, Assistant General Counsel, Samuel A. Marcosson, Office of General Counsel, Equal Employment Opportunity Commission, Washington, DC, for Amicus Curiae EEOC. Robert L. O'Donnell, Vandeventer, Black, Meredith & Martin, Norfolk, Virginia, for Appellee. Douglas S. McDowell, Ann Elizabeth Reesman, McGuiness & Williams, Washington, DC, for Amicus Curiae Advisory Council.

Before WIDENER and HALL, Circuit Judges, and

CHAPMAN, Senior Circuit Judge.

Affirmed as modified and remanded by published opinion. Judge WIDENER wrote the majority opinion, in which Senior Judge CHAPMAN joined. Judge HALL wrote a dissenting opinion.

OPINION

WIDENER, Circuit Judge:

Linda Austin filed suit in the United States District Court for the Western District of Virginia against Owens-Brockway Glass Container, Inc., alleging violations of Title VII and the Americans with Disabilities Act (Disabilities Act or ADA). The district court granted summary judgment in favor of Owens-Brockway because Miss Austin failed to submit her claims to mandatory arbitration under a collective bargaining agreement. Miss Austin appeals, claiming that the district court incorrectly held that she was required to arbitrate her statutory claims. Finding no error, we affirm with only slight modification.

I.

Because the district court disposed of Miss Austin's claims on a motion for summary judgment, all justifiable inferences of relevant facts are drawn in favor of the plaintiff. The grant of summary judgment is reviewed *de novo*. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 2513-14, 91 L.Ed.2d 202 (1986). Miss Austin worked for Owens-Brockway for approximately 14 years until she was injured on the job in 1992. Her physician released her for light-duty work in August 1992, but Owens-Brockway informed her that no light-duty employment was available. Instead, Miss Austin was put on medical leave and provided with workers' compensation benefits. While Miss Austin was on leave, Owens-Brockway eliminated Miss Austin's job classification of equipment cleaner/oiler-greaser. In June 1993, Miss Austin met with Robert McCauley, the Director of Industrial Relations at Owens-Brockway. She learned that Owens-Brockway had terminated her employment and that she would not be reassigned to light-duty work.

Miss Austin filed suit against Owens-Brockway on October 13, 1993. She alleged Owens-Brockway violated the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, and Title VII, 42 U.S.C. § 2000e *et seq.*, by refusing to offer her light-duty work and by terminating her employment while a male ***878** employee, the only other employee in her eliminated job classification, was reassigned to another position at the plant.

Owens-Brockway filed a motion to dismiss for lack of subject matter jurisdiction. The company argued that Miss Austin failed to file her claim with the EEOC and had not obtained a right to sue letter, both prerequisites to filing Disabilities Act and Title VII claims in court. See 42 U.S.C. §§ 2000e-5(b), 12117(a). Further, Owens-Brockway took the position that Miss Austin's claims were subject to mandatory arbitration under a collective bargaining agreement covering her employment with Owens-Brockway. Because Miss Austin failed to file a claim under the grievance-arbitration procedure, Owens-Brockway maintained that she was precluded from filing suit in federal court.

Owens-Brockway offered affidavits in support of its motion to dismiss, so the district court treated the motion as one for summary judgment. Fed.R.Civ.P. 12(b). The district court found that a significant factual dispute existed as to what actions Miss Austin took to file her complaint with the EEOC, and therefore, without deciding the question, declined to grant summary judgment for failure to file a claim or obtain a right to sue letter.[1]

The district court granted summary judgment in favor of Owens-Brockway based on Miss Austin's failure to process her claims under the grievance-arbitration procedure in the collective bargaining agreement. The court held that that agreement subjected Miss Austin's claims to mandatory arbitration. Thus, the court held that under *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991), because she did not submit her claim to arbitration under the collective bargaining agreement, she was precluded from bringing the lawsuit.

II.

A.

[1] Miss Austin first takes the position that she did not have standing under the collective bargaining agreement to arbitrate her dispute with her employer for gender and disability-based claims of discrimination. The argument goes that having no standing, she could not comply with the contract. She now takes the position that she had been discharged and, as a discharged employee, she had no standing to request or demand arbitration of such claims. There is no merit to this position, however. First, the district court found that the alleged discrimination plaintiff complains of occurred on June 1, 1993, the date the defendant terminated Miss

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[1] Since a valid agreement to arbitrate future disputes effectively ousts a court of jurisdiction, see Big Vein Pocahontas Co. v. Browning, 137 Va. 34, 120 S.E. 247 (1923); Burks Pleading and Practice, § 12 (4th ed. 1952), each of the two defenses asserted here is essentially a plea to the jurisdiction. We need decide only one of them and decide the failure to submit the claim to the grievance-arbitration procedure. The cross-appeal of Owens-Brockway, No. 94-1265, with respect to filing a claim with the EEOC and obtaining a right to sue letter is dismissed without prejudice, and we express no opinion on the question.

Austin's employment. It also found that on June 1, 1993, the April 1, 1993-March 31, 1996 Union Shop Contract was in effect. Plaintiff takes no exception to these findings. So any contractual rights plaintiff may have had on account of that discrimination arose during the term of the collective bargaining agreement in question and plaintiff could assert her rights under that contract. Second, even if plaintiff had been a terminated employee, she could have asserted any rights she had under the collective bargaining agreement even after its termination. *Nolde Bros. Inc. v. Local No. 358, Bakery & Confectionery Workers Union*, 430 U.S. 243, 97 S.Ct. 1067, 51 L.Ed.2d 300 (1977), affirmed our decision that an employer and employee's "arbitration duties under the [collective bargaining] contract survived its termination with respect to claims arising by reason of the collective bargaining agreement." 430 U.S. at 248, 97 S.Ct. at 1070. *Nolde Bros.* held that a "Union's claim for severance pay under [an] ... expired collective bargaining agreement [was] ... subject to resolution under the arbitration provision of that contract." 430 U.S. at 255, 97 S.Ct. at 1074. We do not think the case before us is different ***879** from *Nolde Bros.* in any significant degree.

Accordingly, we are of opinion and decide that Miss Austin had standing to assert her claims under the collective bargaining agreement.

B.

[2] The next argument of Miss Austin is that arbitration of her Title VII and disability claims is permissive rather than mandatory. She relies on Section 1, Article 32 [*sic*] of the collective bargaining agreement which states that "[a]ll disputes not settled pursuant to the procedures set forth in Article 31, Grievance Procedures, may be referred to arbitration." She takes the position that the use of the word "may" as just stated makes arbitration permissive rather than obligatory. We are of

opinion, however, that the purpose of the word "may" in this section of the collection bargaining agreement is to give an aggrieved party the choice between arbitration and abandonment of his claim, he "may" either arbitrate or abandon the claim. The interpretation urged by Miss Austin would render the arbitration provision meaningless for all practical purposes. If the parties to such an agreement intended for arbitration to be permissive, there would be no reason to include Article 32, the arbitration provision in the contract, for the parties to an existing dispute could always voluntarily submit it to arbitration. Almost identical words ("either party may request arbitration") in a fact situation indistinguishable from that at hand has received the same construction we place upon it by the Eighth Circuit in *Bonnot v. Congress of Independent Unions, Local No. 14*, 331 F.2d 355, 359 (8th Cir. 1964), which followed *Deaton Truck Line, Inc. v. Local Union 612*, 314 F.2d 418, 422 (5th Cir. 1962). See also *American Italian Pasta Co. v. Austin Co.*, 914 F.2d 1103, 1104 (8th Cir. 1990).

Thus, we decide that the arbitration provisions in the collective bargaining agreement are obligatory and not permissive.

III.

A.

[3][4] In deciding whether to enforce the arbitration provision in this collective bargaining agreement, we start with and rely upon the "well- recognized policy of federal labor law favoring arbitration of labor disputes." *Adkins v. Times-World Corp.*, 771 F.2d 829, 831 (4th Cir. 1985), *cert. denied*, 474 U.S. 1109, 106 S.Ct. 896, 88 L.Ed.2d 930 (1986). In the *Steelworkers Trilogy*, the Supreme Court established that arbitration is favored in labor disputes. See e.g., *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363

U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960); *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed.2d 1403 (1960). We need not rely on the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.*, in this case because, in this circuit, the FAA is not applicable to labor disputes arising from collective bargaining agreements. *Domino Sugar Corp. v. Sugar Workers Local Union 392*, 10 F.3d 1064, 1067 (4th Cir. 1993).

B.

[5] The collective bargaining agreement specifically provides that claims of gender and disability discrimination are subject to the grievance procedure:

> ARTICLE 38
>
> Fair Employment Practice and Equal Opportunities
>
> 1. The Company and the Union will comply with all laws preventing discrimination against any employee because of race, color, religion, sex, national origin, age, handicap, or veteran status.
>
> 2. This Contract shall be administered in accordance with the applicable provisions of the Americans with Disabilities Act. Before taking action relative to this Section, the Company will meet with the Local Union, and both parties will have sufficient opportunity to express their opinions regarding an anticipated action.
>
> 3. Any disputes under this Article as with all other Articles of this Contract ***880** shall be subject to the grievance procedure.

Therefore, Miss Austin contractually agreed to submit her discrimination claims to the grievance procedure.

The grievance procedure specifically provides for binding arbitration.

> ARTICLE 32
>
> Arbitration
>
> 1. All disputes not settled pursuant to the procedure set forth in Article 31, Grievance Procedure, may be referred to arbitration by a notice given to the company or the union by the other within 10 days after the conclusion of Step 4 of the grievance procedure....
>
> * * * * * *
>
> 5. .... The arbitrator's decision shall be final and binding upon both parties.

As we have just demonstrated above, the collective bargaining agreement specifically provides for final and binding arbitration on account of each complaint asserted here: Title VII for the gender claim, and the Disabilities Act for the disability claim. And in part II.B, we have decided that such arbitration is obligatory, not discretionary.

C.

[6] In *Gilmer*, the Supreme Court made clear that agreements to arbitrate statutory claims are enforceable. *Gilmer*, 500 U.S. at 26, 111 S.Ct. at 1652. The *Gilmer* Court recognized that arbitration of a statutory claim is not equal to giving up any right under a statute, it is simply another forum in which to resolve the dispute:

> [B]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.

Gilmer, 500 U.S. at 26, 111 S.Ct. at 1652 (quoting *Mitsubishi*

Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628, 105 S.Ct. 3346, 3354, 87 L.Ed.2d 444 (1985)). *Gilmer* thus rejects the principal concern in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974), that arbitration is an "inappropriate forum" for the resolution of Title VII statutory rights. *Alexander*, 415 U.S. at 56, 94 S.Ct. at 1023-24.

Emphasizing its support of arbitration as a method of dispute resolution, the *Gilmer* Court stated:

> [A]ttacks on [the adequacy] of arbitration "res[t] on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants," and as such, they are "far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes."

Gilmer, 500 U.S. at 30, 111 S.Ct. at 1654 (third alteration in original) (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 481, 109 S.Ct. 1917, 1920, 104 L.Ed.2d 526 (1989)). The Court rejected arguments that arbitration panels may be biased; that limited discovery would hinder a plaintiff attempting to prove discrimination; that lack of a written opinion would result in decreased public awareness of discriminatory employment policies and ineffective appellate review; and that employers and employees have unequal bargaining power. *Gilmer*, 500 U.S. at 30-33, 111 S.Ct. at 1654-56. The Court refused to presume that arbitrators would be biased, *Gilmer*, 500 U.S. at 30, 111 S.Ct. at 1654; explained that choosing arbitration means "trad[ing] the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration," *Gilmer*, 500 U.S. at 31, 111 S.Ct. at 1655 (quoting *Mitsubishi*, 473 U.S. at 628, 105 S.Ct. at 3354); noted that judicial review of arbitration awards, although limited, is adequate to ensure compliance with statutory requirements, *Gilmer*, 500 U.S. at 32 n. 4, 111 S.Ct. at 1655 n. 4; refused to decide that lack of class actions should bar arbitration, because individual conciliation should not be barred; and decided that the claim of unequal bargaining power is one that should be decided in individual cases, *Gilmer*, 500 U.S. at 32-33, 111 S.Ct. at 1655-56.

Gilmer further provides that once parties have contracted to arbitrate a statutory matter, the parties should be held to that agreement ***881** unless Congress intended to prohibit arbitration of that matter:

> "[H]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." ... If such an intention exists, it will be discoverable in the text of the [statute], its legislative history, or an "inherent conflict" between arbitration and the [statute's] underlying purposes.

Gilmer, 500 U.S. at 26, 111 S.Ct. at 1652 (quoting *Mitsubishi*, 473 U.S. at 628, 105 S.Ct. at 3354-55).

The language of the statutes could not be any more clear in showing Congressional favor towards arbitration. The Civil Rights Act of 1991, amending Title VII, states:

> Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including ... arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title.

Pub.L. No. 102-166, § 118, 105 Stat. 1071, 1081. The

Americans with Disabilities Act contains identical language:

> Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including ... arbitration, is encouraged to resolve disputes arising under this chapter.

42 U.S.C. § 12212. The meaning of this language is plain--Congress is in favor of arbitration.

A study of the legislative history of the Civil Rights Act and the Disabilities Act also does not reveal Congressional hostility towards arbitration, rather Congress has encouraged arbitration. See H.R.Rep. No. 40(II), 102d Cong., 1st Sess. 78, *reprinted in* 1991 U.S.C.C.A.N. 694, 764; H.R.Rep. No. 40(I), 102d Cong., 1st Sess. 97, *reprinted in* 1991 U.S.C.C.A.N. 549, 635; H.R.Conf.Rep. No. 755, 101st Cong., 2d Sess. (1990); H.R.Conf.Rep. No. 596, 101st Cong., 2d Sess. 89 (1990), *reprinted in* 1990 U.S.C.C.A.N. 565, 598; H.R.Rep. No. 485(III), 101st Cong., 2d Sess. 76-77, *reprinted in* 1990 U.S.C.C.A.N. 445, 499-500. *Gilmer* provides that we look for a Congressional intent to preclude arbitration of the particular statutory rights. *Gilmer*, 500 U.S. at 26, 111 S.Ct. at 1652. We do not find that intent in the legislative history. In fact, the legislative history for both the Disabilities Act and the Civil Rights Act contains statements that demonstrate the opposite intent:

> This section encourages the use of alternative means of dispute resolution, where appropriate and to the extent authorized by law....
>
> This amendment was adopted to encourage alternative means of dispute resolution that are already authorized by law.

H.R.Conf.Rep. No. 755, 101st Cong., 2d Sess. (1990) (Civil Rights Act); H.R.Rep. No. 485(III), 101st Cong., 2d Sess. 76, *reprinted in* 1990 U.S.C.C.A.N. 445, 499(ADA).

[7][8] Granted, the legislative history of the statutes is not as clear as the statutes themselves that Congress intended to allow arbitration of statutory claims, and one of the conference reports does indicate that arbitration is permissible when voluntary. H.R.Conf.Rep. No. 596, 101st Cong., 2d Sess. 89 (1990), *reprinted in* 1990 U.S.C.C.A.N. 565, 598 ("It is the intent of the conferees that the use of these alternative dispute resolution procedures is completely voluntary."). In this circuit, conference reports are the most persuasive evidence of legislative intent, after the statute itself. *Davis v. Lukhard*, 788 F.2d 973, 981 (4th Cir.), *cert. denied*, 479 U.S. 868, 107 S.Ct. 231, 93 L.Ed.2d 157 (1986). Furthermore, a committee report states that "voluntary mediation and arbitration are far preferable to prolonged litigation for resolving employment discrimination claims." H.R.Rep. No. 40(II), 102d Cong., 1st Sess. 78, *reprinted in* 1991 U.S.C.C.A.N. 694, 764. Another committee report contains a statement about what that committee "believes" the effect of the statute is, however, that committee's belief is not dispositive of what Congress intended when it enacted the statute. H.R.Rep. No. 40(I), 102d Cong., 1st Sess. 97, *reprinted in* 1991 U.S.C.C.A.N. 549, 635 ("[T]he Committee believes that any agreement to submit disputed issues to arbitration, ... does not preclude the affected person from seeking relief under the enforcement ***882** provisions of Title VII. This view is consistent with ... *Alexander*. ..."). We need not decide what the legislative history means in absolute terms because in our case it means that voluntary agreements to arbitrate statutory claims are allowed. To decide otherwise, we would have to hold that *Gilmer* has no effect at all and that *Alexander* is still the law that statutory claims

cannot be the subject of required arbitration. We do not think Congress intended to return to the old law. Miss Austin's burden under *Gilmer* is to show that Congress intended to preclude arbitration of statutory claims, and she has failed to meet that burden. Even if the provisions of the legislative history are contrary to the statute, the statute must prevail. *Davis v. Lukhard*, 788 F.2d at 981. Especially in that event, the reasoning of Justice Scalia, concurring, in *Thompson v. Thompson*, 484 U.S. 174, 188, 191-192, 108 S.Ct. 513, 520-21, 522, 98 L.Ed.2d 512 (1988), should apply: "Committee reports, floor speeches, and even colloquies between Congressmen, ... [only page references omitted] are frail substitutes for bicameral vote upon the text of a law and its presentment to the President."

Moreover, there is no inherent conflict between arbitration and the underlying purposes of the Disabilities Act or Title VII. Although *Gilmer* involved a claim under the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.*, the principles behind the Age Discrimination Act are the same as those behind the Disabilities Act and Title VII. The statement of the Court in response to Gilmer's claim that compulsory arbitration would be inconsistent with the purposes of the Age Discrimination Act holds true for any claim that compulsory arbitration would be inconsistent with the policies behind the Disabilities Act and Title VII. The Court replied:

> As Gilmer contends, the ADEA is designed not only to address individual grievances, but also to further important social policies. We do not perceive any inherent inconsistency between those policies, however, and enforcing agreements to arbitrate age discrimination claims. It is true that arbitration focuses on specific disputes between the parties involved. The same can be said, however, of judicial resolution of claims. Both of these dispute resolution mechanisms nevertheless also can further broader social purposes. The Sherman Act, the Securities Exchange Act of 1934, RICO, and the Securities Act of 1933 all are designed to advance important public policies, but, as noted above, claims under those statutes are appropriate for arbitration. "[S]o long as the prospective litigant effectively may vindicate[his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function."

Gilmer, 500 U.S. at 28, 111 S.Ct. at 1653 (alterations in original) (internal citations omitted) (quoting *Mitsubishi*, 473 U.S. at 637, 105 S.Ct. at 3359). The Court clearly has removed any doubt that age discrimination claims may be arbitrated. We are of opinion that the same reasoning is valid for gender and disability discrimination claims.

D.

Every case decided in the Courts of Appeal under § 118 of the 1991 amendments to the Civil Rights Act has enforced anticipatory agreements to arbitrate claims involving statutory rights.[2] Three federal cases arose

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[2] The dissent relies upon *Tran v. Tran*, 54 F.3d 115 (2d Cir. 1995), for a conflict in the circuits. We think that reliance is misplaced, for *Tran* was a wage and hour case and has few similarities to the case at hand, as we will now discuss.

The first, and a patent difference, is that the wage and hour law, 29 U.S.C. § 201, et seq. (the Fair Labor Standards Act) does not contain any provision encouraging arbitration as does Title VII (§ 118 of the 1991 amendment), and the Disabilities Act (42 U.S.C. § 12212), each of which states that "arbitration is encouraged to resolve disputes arising under" the respective statutes.

If that were not all, the Court has stated in *Gilmer* that "... all statutory claims may not be appropriate for arbitration...." 500 U.S. at 26, 111 S.Ct. at 1652. In *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 101 S.Ct. 1437, 67 L.Ed.2d 641 (1981), a wage and hour case which involved an arbitration provision in a collective bargaining agreement, the Court declined to require arbitration prior to filing suit, principally on the ground that it had held that "congressionally granted FLSA rights take precedence over conflicting provisions in a collective bargaining compensation arrangement," 450 U.S. at 740-41, 101 S.Ct. at 1445, and followed four of its previous decisions in that respect. 450 U.S. at 741, 101 S.Ct. at 1445. Similarly, as the dissent relies on *McDonald v. West Branch*, 466 U.S. 284, 104 S.Ct. 1799, 80 L.Ed.2d 302 (1984), and *Livadas v. Bradshaw*, 512 U.S. 107, 114 S.Ct. 2068, 129 L.Ed.2d 93 (1994), we note that both *McDonald* and *Livadas* are cases under 42 U.S.C. § 1983, and that *McDonald* reasoned that "an arbitration proceeding cannot provide an adequate substitution for a judicial trial." 466 U.S. at 292, 104 S.Ct. at 1804. *Livadas's* reasoning was that "Congress, of course, has given no more indication of any intent to foreclose actions like Livadas's than the sort brought by the cab company [in the *Golden State Transit Corp v. Los Angeles*, 493 U.S. 103, 110 S.Ct. 444, 107 L.Ed.2d 420 (1989) cases]." 512 U.S. at ----, 114 S.Ct. at 2084.

Tran depends on *Barrentine* for its decision that an employee, subject to a collective bargaining agreement with an arbitration procedure, is not required to arbitrate wage and hour claims prior to filing suit under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* With respect to discrimination claims, however, the Supreme Court distinguished *Barrentine* in *Gilmer* itself by stating that "reliance ... is misplaced" "on *Alexander* and its progeny, *Barrentine* ... and *McDonald* ....", for the proposition that would "preclude arbitration of employment discrimination claims." *Gilmer*, 500 U.S. at 33, 111 S.Ct. at 1656. Gilmer continued with regard to the *Alexander* line of cases:

> First, those cases did not involve the issue of the enforceability of an agreement to arbitrate statutory claims. Rather, they involved the quite different issue whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims. Since the employees there had not agreed to arbitrate their statutory claims, and the labor arbitrators were not authorized to resolve such claims, the arbitration in those cases understandably was held not to preclude subsequent statutory

in the context of arbitration clauses in employment contracts growing out of securities registration applications. *Bender v. A.G. Edwards & Sons, Inc.*, 971 F.2d 698 (11th Cir. 1992); *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305 (6th Cir. 1991); *Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229 (5th Cir. 1991). A fourth federal case arose in the context of an arbitration clause in an ordinary employment contract. *Mago v. Shearson Lehman Hutton, Inc.*, 956 F.2d 932 (9th Cir. 1992). And two state cases also arose in the context of arbitration clauses in employment contracts growing out of securities registration applications. *Benefits Communication Corp. v. Klieforth*, 642 A.2d 1299 (D.C. 1994); *Fletcher v. Kidder, Peabody & Co.*, 81 N.Y.2d 623, 601 N.Y.S.2d 686, 619 N.E.2d 998 (1993), *cert. denied*, 510 U.S. 993, 114 S.Ct. 554, 126 L.Ed.2d 455 (1993).

Bender v. A.G. Edwards & Sons, Inc. involved an

> actions. Second, because the arbitration in those cases occurred in the context of a collective-bargaining agreement, the claimants there were represented by their unions in the arbitration proceedings. An important concern therefore was the tension between collective representation and statutory rights, a concern not applicable to the present case. Finally, those cases were not decided under the FAA, which, as discussed above, reflects a "liberal federal policy favoring arbitration agreements."

Gilmer, 500 U.S. at 35, 111 S.Ct. at 1657 (quoting in the last two lines, *Mitsubishi*, 473 U.S. at 625, 105 S.Ct. at 3353). Our case, like *Gilmer*, involves the issue of the enforceability of an agreement to arbitrate statutory claims. This case arises in the context of a collective bargaining agreement so there may be concern for any tension between collective representation and statutory rights. As we find in part III.B, however, Miss Austin is a party to a voluntary agreement which has explicitly agreed to the arbitration of her statutory complaints. That should be enforced. Finally, as noted in part III.A, although we do not rely on the FAA in this case, we do rely on the federal labor law policy encouraging arbitration of labor disputes as expressed in the *Steelworkers Trilogy*.

employee who, in her application for registration as a stock broker, agreed to arbitrate employment disputes. *Bender*, 971 F.2d at 699. When the employee filed a sexual harassment suit in federal court, the employer moved to stay the case pending arbitration under the Federal Arbitration Act, 9 U.S.C. § 1 *et seq*. *Bender*, 971 F.2d at 699. The Eleventh Circuit found, in light of Gilmer, that Title VII claims can be subject to compulsory arbitration and remanded the case with orders that the district court stay federal court proceedings pending the employee's arbitration of her Title VII claim. *Bender*, 971 F.2d at 699, 701.

Willis v. Dean Witter Reynolds, Inc. also involved an employee who agreed to arbitrate employment disputes when she signed a securities registration form. *Willis*, 948 F.2d at 306. When the employee filed state claims of sexual harassment and gender discrimination in a Kentucky court, the employer removed the case to federal court based on diversity jurisdiction. *Willis*, 948 F.2d at 306. The employee then amended her complaint ***884** to include a claim under Title VII. *Willis*, 948 F.2d at 306. The Sixth Circuit noted that the Supreme Court, in *Gilmer*, held enforceable the same arbitration clause at issue in that case. *Willis*, 948 F.2d at 307. The court discussed *Gilmer* 's rejection of the *Alexander* principle that employment discrimination claims could not be arbitrated and *Gilmer*'s support of arbitration as an alternative forum for resolution of disputes involving statutory rights. *Willis*, 948 F.2d at 308-10. The court concluded that the employee's discrimination claim was subject to her agreement to arbitrate. *Willis*, 948 F.2d at 312.

Alford v. Dean Witter Reynolds, Inc., was yet another case in which an employee sued her stock broker employer and alleged a violation of Title VII. *Alford*, 939 F.2d at 229. The case was first decided favorably to *Alford* in the lower courts, but the Supreme Court vacated the judgment of the Fifth Circuit and remanded the case for consideration in light of *Gilmer*. *Alford*, 939 F.2d at 229. The Fifth Circuit compared Title VII to the Age Discrimination Act, under which the Supreme Court decided *Gilmer*, and concluded that because the civil rights statutes were similar, claims under Title VII could be arbitrated just as claims under the Age Discrimination Act could be arbitrated. *Alford*, 939 F.2d at 230. The court noted *Gilmer*'s rejection of the *Alexander* principle that arbitration was unfavored. *Alford*, 939 F.2d at 230.

Mago v. Shearson Lehman Hutton, Inc. involved an employee who, in her employment application, agreed to arbitrate employment disputes. *Mago*, 956 F.2d at 933-34. When the employee filed a sexual harassment and gender discrimination suit against her employer, the employer moved to stay the case pending compulsory arbitration. *Mago*, 956 F.2d at 934. The Ninth Circuit concluded that the employee did not meet her burden under *Gilmer* of proving that Congress intended to preclude arbitration of Title VII claims and enforced the arbitration agreement. *Mago*, 956 F.2d at 935.

The District of Columbia Court of Appeals also has enforced an anticipatory agreement, in a securities registration application, to arbitrate employment disputes. *Benefits Communication Corp. v. Klieforth*, 642 A.2d 1299 (D.C. 1994). The employee filed a gender discrimination suit in Superior Court prior to the Supreme Court's *Gilmer* decision, and six weeks after *Gilmer* was decided the employer moved to compel arbitration. *Klieforth*, 642 A.2d at 1300. Although the employee's claim arose under the District of Columbia's Human Rights Act, the court explained that it usually looked to federal civil rights cases for guidance in interpreting the Human Rights Act. *Klieforth*, 642 A.2d at 1301-02. The court noted that *Gilmer* held that an agreement to arbitrate age discrimination claims could be enforced and that every federal court of appeals to decide the issue has extended *Gilmer* to cover Title VII discrimination claims. *Klieforth*, 642 A.2d at 1302 (citing *Bender*, *Mago*, *Willis*, and *Alford*). The court recognized that federal precedent "holds that employment discrimination claims can be subject to arbitration if the employer and employee have agreed to arbitrate disputes of that nature." *Klieforth*, 642 A.2d at 1303. Accordingly, the court found that the arbitration agreement was enforceable. *Klieforth*, 642 A.2d at 1304.[3]

The Court of Appeals of New York has addressed the enforceability of agreements to arbitrate statutory claims, again in the context of employment contracts growing out of securities registration applications, and held that the agreements were enforceable. *Fletcher v. Kidder, Peabody, Co.*, 81 N.Y.2d 623, 601 N.Y.S.2d 686, 619 N.E.2d 998, 1005-06 (1993). *Fletcher* consolidated two cases, one involved a race discrimination claim and the other involved a gender discrimination claim. *Fletcher*, 601 N.Y.S.2d 686, 619 ***885** N.E.2d at 1000. The employees had agreed to arbitrate employment disputes when they signed securities registration applications at their respective firms. One employee filed a race discrimination claim and the other employee filed a gender discrimination claim, and each employer moved to compel arbitration under the respective

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[3] The court also found that the 1991 amendments to the Civil Rights Act of 1964 did not modify or overrule *Gilmer*. *Klieforth*, 642 A.2d at 1304. While we agree with the court's statement that the statute on its face "expressly encourage[s]" arbitration as an alternative to litigation, we are not in entire agreement with the statement that it is not necessary to consider the statute's legislative history. *Klieforth*, 642 A.2d at 1305. *Gilmer* names legislative history as a place to look to discover Congressional intent to preclude arbitration of statutory claims. *Gilmer*, 500 U.S. at 26, 111 S.Ct. at 1652.

agreements. *Fletcher*, 601 N.Y.S.2d 686, 619 N.E.2d at 1000. In light of *Gilmer*, the court overruled a prior decision that held that anticipatory agreements to arbitrate employment discrimination claims were not enforceable. *Fletcher*, 601 N.Y.S.2d 686, 619 N.E.2d at 1003. Finding Title VII comparable to the state law under which the case was to be decided, the court analyzed the legislative history of Title VII to find evidence of Congressional intent to prohibit anticipatory agreements to arbitrate statutory disputes. The court found no evidence of any such intent. *Fletcher*, 601 N.Y.S.2d 686, 619 N.E.2d at 1003. The court discussed *Gilmer*'s recognition of arbitration as a favorable method of dispute resolution and stated that after *Gilmer*, the question is "whether Congress, in creating a statutory remedy, intended that arbitration of the statutorily established claim would be foreclosed." *Fletcher*, 601 N.Y.S.2d 686, 619 N.E.2d at 1004.

The only difference between these six cases and this case is that this case arises in the context of a collective bargaining agreement. *Bender*, *Willis*, *Alford*, *Klieforth*, and *Fletcher* arose in the context of employment contracts growing out of securities registration applications, and *Mago* also arose in the context of an employment contract. In all of the cases, however, including the case at hand, the employee attempting to sue had made an agreement to arbitrate employment disputes. Whether the dispute arises under a contract of employment growing out of securities registration application, a simple employment contract, or a collective bargaining agreement, an agreement has yet been made to arbitrate the dispute. So long as the agreement is voluntary, it is valid, and we are of opinion it should be enforced.

E.

[9][10][11] A union has the right and duty to bargain

for the terms and conditions of employment. 29 U.S.C. § 158(d). Through the collective bargaining process, unions may waive the right to strike and other rights protected under the National Labor Relations Act, 29 U.S.C. § 151 *et seq*. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 705, 103 S.Ct. 1467, 1475-76, 75 L.Ed.2d 387 (1983). The Supreme Court finds such waivers "valid because they rest on the premise of fair representation." *Metropolitan Edison*, 460 U.S. at 705, 103 S.Ct. at 1476 (citations omitted). There is no reason to distinguish between a union bargaining away the right to strike and a union bargaining for the right to arbitrate. The right to arbitrate is a term or condition of employment, and as such, the union may bargain for this right. This has been the law at least since *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 77 S.Ct. 912, 1 L.Ed.2d 972 (1957): "Plainly the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike." *Lincoln Mills*, 353 U.S. at 455, 77 S.Ct. at 917.

F.

[12] Finally, the rule of the Supreme Court and this circuit is that an employee must follow the grievance procedure established by the collective bargaining agreement prior to filing suit in federal court. *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652, 85 S.Ct. 614, 616, 13 L.Ed.2d 580 (1965); *Adkins v. Times-World Corp.*, 771 F.2d 829, 832 (4th Cir. 1985), *cert. denied*, 474 U.S. 1109, 106 S.Ct. 896, 88 L.Ed.2d 930 (1986). Thus, an employee cannot sue an employer without first going through the grievance procedure, and this is what Miss Austin is attempting to do. We need not decide any question of union good faith in this case (and none has been suggested), because Miss Austin must pursue her claim under the grievance procedure.

[13] Miss Austin is a party to a voluntary agreement to submit statutory claims to arbitration. The collective bargaining agreement specifically lists gender and disability discrimination as claims that are subject to arbitration. This voluntary agreement is consistent with the text of Title VII and the *886 Disabilities Act, the legislative intent behind those statutes, and the purposes of those statutes. Finding that Congress did not intend to preclude arbitration of claims under Title VII and the Disabilities Act, we hold that the arbitration provision in this collective bargaining agreement is enforceable.

IV.

We express no opinion as to whether or not arbitration may now be available or the result thereof. That question is not before us.

We have examined the final order disposing of the case in the district court and are not clear as to whether or not the disposition was without prejudice to the merits of Miss Austin's claim. Since we have affirmed an adjudication that the court could not hear the same because of agreed-upon arbitration, the dismissal of the case should be without prejudice to the merits of the claim asserted. Whether or not Miss Austin has abandoned her claim or otherwise rendered it unenforceable by choosing to attempt to litigate the same rather than arbitrate it is also a question upon which we express no opinion.

On remand, the district court will amend its order dismissing the case to insure it expresses no opinion on the merits of the claim, or whether or not the same is subject to arbitration, or whether or not it may now be so asserted.

The judgment of the district court is accordingly

AFFIRMED AS MODIFIED AND THE CASE IS

REMANDED.

K.K. HALL, Circuit Judge, dissenting:

I respectfully dissent.

After its inventory of cases that follow the holding of *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991), the majority concludes, "[t]he only difference between these ... cases and this case is that this case arises in the context of a collective bargaining agreement." *Supra* at 885. I agree. The majority fails to recognize, however, that the only difference makes all the difference. A labor union may not prospectively waive a member's individual right to choose a judicial forum for a statutory claim.

I.

In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974), a unanimous Supreme Court held that a person may sue under Title VII notwithstanding that he has submitted his claims to arbitration under a collective bargaining agreement and lost. In reaching this conclusion, the Court stated that an employee's individual statutory right is completely independent of any contractual right he may have under a collective bargaining agreement, and the individual rights of employees are not subject to waiver by their union:

> In submitting his grievance to arbitration, an employee seeks to vindicate his contractual right under a collective-bargaining agreement. By contrast, in filing a lawsuit under Title VII, an employee asserts independent statutory rights accorded by Congress. The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same occurrence. And certainly no inconsistency results from permitting both rights to be enforced in their respectively appropriate forums.
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> * * * * * *
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> ... [W]e think it clear that there can be no prospective waiver of an employee's rights under Title VII. It is true, of course, that a union may waive certain statutory rights related to collective activity, such as the right to strike. [cites omitted] These rights are conferred on employees collectively to foster the processes of bargaining and properly may be exercised or relinquished by the union as collective-bargaining agent to obtain economic benefits for union members. Title VII, on the other hand, stands on plainly different ground; it concerns not majoritarian processes, but an individual's right to equal employment opportunities. Title VII's strictures are absolute and represent a congressional command that each employee be free from discriminatory practices. Of necessity, the rights conferred can form no part of the ***887** collective-bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII. In these circumstances, an employee's rights under Title VII are not susceptible of prospective waiver.
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> * * * * * *
>
> We think, therefore, that the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance-arbitration clause of a collective- bargaining

> agreement and his cause of action under Title VII. The federal court should consider the employee's claim *de novo*.

415 U.S. at 49-52, 59-60, 94 S.Ct. at 1020-21, 1025. Thus, under *Gardner-Denver*, a clause in which a union purported to waive employees' rights to pursue Title VII claims in court would be clearly unenforceable. *Gardner-Denver* was closely adhered to in *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 101 S.Ct. 1437, 67 L.Ed.2d 641 (1981), and *McDonald v. City of West Branch*, 466 U.S. 284, 104 S.Ct. 1799, 80 L.Ed.2d 302 (1984).

II.

Gilmer did not overrule this line of authority. The Supreme Court has said so, twice.

First of all, in *Gilmer* itself, the Court enforced an agreement to arbitrate contained in an individual (not collective) contract between a stockbroker and his employer. Writing for a seven-member majority, Justice White was careful to distinguish *Gardner-Denver*. Though he eschewed language in *Gardner-Denver* that expressed judicial mistrust of arbitration, he left its holding intact. He explained that the collective bargaining agreements in *Gardner-Denver* and its progeny did not contain the agreement of the employees to arbitrate statutory claims. Second, and of central importance here, because labor arbitrations involve contracts negotiated by unions, "[a]n important concern therefore was the tension between collective representation and individual statutory rights, a concern not applicable to the present case." Finally, *Gilmer*, unlike the labor cases, arose under the Federal Arbitration Act. 500 U.S. at 35, 111 S.Ct. at 1656-57.

In a more recent unanimous decision, the Court reiterated the vitality of *Gardner-Denver*, albeit in dicta:

> In holding that an agreement to arbitrate an Age Discrimination in Employment Act claim is enforceable under the Federal Arbitration Act, *Gilmer* emphasized its basic consistency with our unanimous decision in [*Gardner- Denver*].

Livadas v. Bradshaw, 512 U.S. 107, ---- n. 21, 114 S.Ct. 2068, 2080 n. 21, 129 L.Ed.2d 93 (1994).

Several federal courts have recognized that *Gardner-Denver*, rather than *Gilmer*, continues to govern in the context of collective bargaining agreements. *Tran v. Tran*, 54 F.3d 115, 117, 118 (2nd Cir. 1995); *Humphrey v. Council of Jewish Federations*, 901 F.Supp. 703, 709-710 (S.D.N.Y. 1995); *Jackson v. Quanex Corp.*, 889 F.Supp. 1007, 1010-1011 (E.D.Mich. 1995); *Randolph v. Cooper Industries*, 879 F.Supp. 518, 520-522 (W.D.Pa. 1994); *Block v. Art Iron, Inc.*, 866 F.Supp. 380, 384-387 (N.D.Ind. 1994); *Griffith v. Keystone Steel & Wire Co.*, 858 F.Supp. 802, 804 (C.D.Ill. 1994); *Claps v. Moliterno Stone Sales, Inc.*, 819 F.Supp. 141, 145-147 (D.Conn. 1993). The case first above listed is a decision of the Court of Appeals for the Second Circuit; consequently, the majority's holding will create a split among the circuits.

Gardner-Denver is the law. *Austin* may pursue her contractual remedy, her statutory remedy, or both. The judgment of the district court should be reversed.

FILED

JAN 27 1998

CLERK

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No. 97-889

In The

Supreme Court of the United States

◆

October Term, 1997

CEASAR WRIGHT,

Petitioner,

vs.

UNIVERSAL MARITIME SERVICE CORP., *et al.*,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

The Petition accurately lists the parties to the proceeding.

None of the Respondents are publicly held corporations or other publicly held entities, nor are they parents, subsidiaries, or affiliates of, or a trade association representing, a publicly held corporation or other publicly held entity. No other publicly held corporation or other publicly held entity has a direct financial interest in the outcome of this litigation.

TABLE OF CONTENTS

Page

Parties to the Proceeding i

Table of Contents ii

Table of Citations iii

Statement of the Case 1

  A. Proceedings Below 1

  B. Statement of Facts 2

Reasons for Denying the Writ 5

  I. The "Conflict" Is Not Between The Decision Below And Those Of Other Courts. 7

  II. Petitioner's Attitude Toward The Fourth Circuit Is Unwarranted. 11

  III. There Is No Requirement In The Law That An Employee "Personally Waive His Right To A Judicial Trial" In Order To Be Freed Of A Requirement To Follow A Contractual Grievance-and-Arbitration Procedure. 12

Conclusion 14

Page

TABLE OF CITATIONS

Cases Cited:

Alexander v. Gardner-Denver Co., 415 U.S. 147 (1974) 9, 11

Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875 (4th Cir.), *cert. denied*, __ U.S. __, 117 S. Ct. 432, 136 L. Ed. 2d 330 (1996) 6, 8, 10, 11, 12

Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728 (1981) 8

Brisentine v. Stone & Webster Engineering Corp., 117 F.3d 519 (11th Cir. 1997) 9

Brown v. Trans World Airlines, 127 F.3d 337 (4th Cir. 1997) 12

Cole v. Burns International Security Services, 105 F.3d 1465 (D.C. Cir. 1997) 8

Gilmer v. Interstate/Johnson Lane Corp., 895 F.2d 195 (4th Cir. 1990) 13

Harrison v. Eddy Potash, Inc., 112 F.3d 1437 (10th Cir.), *petition for cert. filed*, 66 U.S.L.W. 3137 (Aug. 6, 1997) 9, 10, 11

Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246 (1994) 12

Contents

Page

Martin v. Dana Corp., __ F.3d __, 75 Fair Empl. Prac. Cas. (BNA) 870 (3d Cir. 1997) 13

Penny v. United Parcel Service, 128 F.3d 408 (6th Cir. 1997) 9

Prudential Insurance Co. v. Lai, 42 F.3d 1299 (9th Cir. 1994), *cert. denied*, __ U.S. __, 116 S. Ct. 61, 133 L. Ed. 2d 24 (1995) 13

Pryner v. Tractor Supply Co., 109 F.3d 354 (7th Cir.), *cert. denied*, __ U.S. __, 118 S. Ct. 294, 139 L. Ed. 2d 227 (1997) 9, 10

Stacks v. Southwestern Bell Yellow Pages, Inc., 27 F.3d 1316 (8th Cir. 1994) 9

Tran v. Tran, 54 F.3d 115 (2d Cir. 1995), *cert denied*, __ U.S. __, 116 S. Ct. 1412, 134 L. Ed. 2d 542 (1996) 8, 9

Varner v. National Supermarkets, Inc., 94 F.3d 1209 (8th Cir. 1996), *cert. denied*, __ U.S. __, 117 S. Ct. 946, 136 L. Ed. 2d 835 (1997) 9, 10, 11

Contents

Page

Statutes Cited:

Americans with Disabilities Act, 42 U.S.C. §§ 12101, *et seq.*, Pub. L. 101-336, July 26, 1990, 104 Stat. 327 .... 1, 5, 6, 7, 8, 9, 14

§ 513, 42 U.S.C. § 12212, Pub. L. 101-336, Title V, § 513, 104 Stat. 377 (July 26, 1990) 7

Civil Rights Act of 1964, Title VII, 42 U.S.C. §§ 2000e *et seq.*, Pub. L. 88-352, Title VII July 2, 1964, 78 Stat. 253, as amended 11, 12, 13

Civil Rights Act of 1991, § 118, Pub. L. 102-166, § 118, Nov. 21, 1991, 105 Stat 1071, 1081 7

Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.*, Act June 25, 1938, c. 676, 52 Stat. 1060, as amended . 8

Family and Medical Leave Act, 29 U.S.C. §§ 2601 *et seq.*, Pub. L. 103-3, Feb. 5, 1993, 107 Stat. 6 12

Longshore and Harbor Workers Compensation Act, 33 U.S.C. §§ 901, *et seq.*, Act, Mar. 4, 1927, c. 509, 44 Stat. 1424, as amended 2

National Labor Relations Act, as amended by Labor Management Relations Act, 29 U.S.C. §§ 141 *et seq.*, Act June 23, 1947, c. 120, 61 Stat. 136 12

Railway Labor Act, 45 U.S.C. §§ 151 *et seq.*, Act May 20, 1926, c. 347, 44 Stat. 577, as amended 12

Page

Rule Cited:

S. Ct. Rule 10 14

Other Authorities Cited:

Cole, "A Funny Thing Happened on the Way to the (Alternative) Forum: Reexamining *Alexander v. Gardner-Denver* in the Wake of *Gilmer v. Interstate/Johnson Lane Corp.*," 1997 B.Y.U.L. Rev. 591 (1997) 7

Coleman & Vasquez, "Mandatory Arbitration of Statutory Issues Under Collective Bargaining: *Austin* and its Progeny," 48 Lab. L.J. 703 (1977) 7, 8

Hodges, "Mediation and the Americans with Disabilities Act," 30 Ga. L. Rev. 431 (1996) 7

Keene, "Collective Bargaining and Compulsory Arbitration of Americans With Disabilities Act Claims," 48 Lab. L.J. 738 (1997) 7

Note, "Compulsory Arbitration in the Unionized Workplace: Reconciling *Gilmer, Gardner-Denver* and the Americans with Disabilities Act," 37 B.C.L. Rev. 479 (1996) 7

STATEMENT OF THE CASE

A. Proceedings Below

The Petition seeks review of an unpublished decision by the United States Court of Appeals for the Fourth Circuit, affirming an unpublished decision of the United States District Court for the District of South Carolina which adopted a Report and Recommendation of a Magistrate Judge of that court.

The decisional process in this action began with the Report and Recommendation of Magistrate Judge Robert S. Carr that summary judgment be entered for the Respondents dismissing Petitioner Ceasar Wright's Complaint, which alleged violations of the Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq.*, ("ADA"). [J.A. 216-22.] Judge Carr concluded that Wright's failure to pursue his available remedies under a collectively-bargained grievance-and-arbitration procedure deprived the court below of jurisdiction to adjudicate Wright's ADA claim. This recommendation was adopted by the Honorable David C. Norton [J.A. 227-35], and this action was dismissed without prejudice. [J.A. 236.] After a motion for reconsideration was filed [J.A. 237 ff.], the court reaffirmed its earlier ruling [J.A. 273-78], finding it unnecessary to rule on a belatedly-filed "Motion to Compel Arbitration with Supporting Authorities (and Join Additional Party)" [J.A. 251-55], which was filed on the Friday before the court's Monday hearing on the motion to vacate. [*See* J.A. 9, docket entry 37 and unnumbered entry following.] An appeal was noticed two weeks thereafter. [J.A. 279-80].

Oral argument was held in the Fourth Circuit on July 7, 1997, and an unanimous, unpublished decision dated July 29, 1997 (121 F.3d 702 (mem.)) affirmed the District Court.

Following the grant of an extension of time by Order dated

October 16, 1997, Wright filed his Petition on November 25, 1997. Respondents requested and were granted an extension of time for the filing of this Brief (Order dated December 11, 1997).

B. Statement of Facts

Petitioner has been a longshoreman in the Port of Charleston, South Carolina, since 1970, working for various stevedoring contractors through referrals made by Local 1422 of the International Longshoremen's Association. [Complaint ¶¶ 11-13, J.A. 15.] On February 18, 1992, Wright fell from a cargo container and fractured his right heel. [Complaint, ¶ 14, J.A. 15.] Wright's physician of choice, orthopedist Howard Brilliant, opined that Wright would "never be able to work on the waterfront again"; a three-physician panel, consisting of Dr. Brilliant and two others, expressed the view that Wright would be permanently and totally disabled from performing longshoring duties; and Wright presented sworn testimony that his disability was permanent and total. [Complaint ¶ 15, J.A. 16; J.A. 134, 178] ("Claimant contends that he is permanently and totally disabled and not able to work on the waterfront or in any other capacity on an uninterrupted basis.") Wright's claim for benefits under the Longshore and Harbor Workers' Compensation Act was settled for a lump sum payment of $250,000, which settlement was approved by the United States Department of Labor on June 10, 1994. [Complaint, ¶ 17, J.A. 16; J.A. 175-179, 180-182.] By this time, Wright had also applied for, and was receiving, disability benefits from the Social Security Administration. [J.A. 25, 27, 29, 177, 189.]

However, on January 2, 1995, Wright appeared at the Local 1422 hiring hall, representing that he was ready and able to return to work. [Complaint, ¶ 20, J.A. 16; J.A. 194.] He later presented a note from Dr. Brilliant which purported to release him to return to work without restriction. [Complaint, ¶ 19, J.A. 16; Answer ¶ 19, J.A. 52; J.A. 60; J.A. 194.] This back-to-work note was not issued in conjunction with a physical examination; Dr. Brilliant testified on deposition that he was simply permitting his patient to "see" if he could work. [J.A. 76-80, 106-07.] Thus, the allegations in the Petition regarding "resorption" of a calcaneus deposit in his heel were not presented to Respondents until after this litigation ensued.

From January 2 through January 11, 1995, Wright worked for four different stevedoring contractors. [Complaint, ¶ 21, J.A. 16-17.] When it was discovered that Wright was back at work, the stevedoring companies, both individually and acting through their multi-employer collective bargaining representative the South Carolina Stevedores Association ("SCSA"), advised Local 1422 that Wright would no longer be accepted for employment referral. [Complaint, ¶ 23, J.A. 17.] These letters (*e.g.*, J.A. 61; and *see* J.A. 169) specifically relied on the provisions of two documents which had been bargained between the Local and SCSA: the collective bargaining agreement and the Longshore Seniority Plan.

> It has come to our attention that Caesar [*sic*] Wright has returned to work although he was certified as permanently and totally disabled. Both paragraph 13(D)(6),[1] and paragraph 13(B)(1)[2] [of the collective

---

[1] There shall be no interference with the Employer's right to shift men from hatch to hatch, ship to ship, dock to ship or ship to dock so long as the number of men shifted from any gang does not reduce the gang structure below the minimum required. . . .

The Employer also reserves the right to hire and discharge. It is recognized that the Employer has the right to utilize men in any combination of job classification for which they are qualified. . . .

[Section 13.(D)(6).] [J.A. 157.]

[2] The Employer shall give due regard to the following factors: (Cont'd)

> bargaining agreement] permit the employers to determine whether an employee is "qualified" to perform job assignment. Once an individual is certified as permanently and totally disabled, he is no longer qualified to perform longshore work of any kind.

[Defendants' Motion for Summary Judgment, Affidavit of James P. Lamb ("Lamb Affidavit"), ¶ 5 and Tab 3, J.A. 144, 169; *and see* J.A. 257, 261-62.]

Local 1422's response also was couched in contract terms:

> . . . Your quotation of 13(D)(6) and 13(B)(1)

(Cont'd)

1. Protecting the safety and health of all men employed in the operation.

2. Regulating stevedoring operations to best accomplish the safe, efficient and orderly movement of cargo.

3. Utilize modern methods and equipment in the interest of avoiding unnecessary manual labor. . . .

4. Making the best use of skilled manpower in light of the above consideration [*sic*].

It is distinctly understood and agreed that the Union has the privilege of bringing to the attention of each Employer any practices which the Union finds are not in accord with the spirit of the foregoing. The Employers hereby agree to promptly investigate and give careful consideration to all suggestions and recommendations of the Union in light of the objectives set forth above. If such procedure still fails to satisfactorily dispose of any such questions, they shall be resolved through the arbitration procedure set forth in Clause 15. [Section 13.(B)(1)]. [J.A. 156.]

> suggests that our contract permits you to deny employment to Caesar [*sic*] Wright. I will advise you to take another look. In fact, 13(D)(6) charges the employer to utilize Caesar [*sic*] Wright in jobs he is qualified to perform and 13(B)(1) does not apply. If Caesar [*sic*] Wright is proven to have limited disability and he returns to work and can perform his duties, I believe Federal laws protect his right to do so under the "American with Disability Act." Further, by denying him employment, violates our current Collective Bargaining Agreement 15(A)(1)[3] "lock-out" of a member.

[Lamb Affidavit, J.A. 144-45, ¶ 6 and Tab 4, J.A. 170; and *see* J.A. 258-260.] No further proceedings were held; instead, Local 1422 advised Wright to proceed through counsel to assert his claims. [J.A. 173, 191, 195.]

Wright then filed charges of discrimination against three of SCSA's member companies [J.A. 24-32], later adding charges against three other SCSA members and SCSA itself. [J.A. 33-40] (SCSA and its members are collectively referred to as "Stevedores"). The Equal Employment Opportunity Commission dismissed Wright's charges and issued notices of right to sue [J.A. 41-46], whereupon this action was commenced.

REASONS FOR DENYING THE WRIT

Despite Petitioner's attempt to characterize the Fourth Circuit's decision as a lonely, contrarian voice, the issue presented is much more narrow and highly fact-specific: the question which should have been resolved through the collectively-bargained grievance procedure was whether Wright was "qualified" to resume service as a longshoreman in the Port of Charleston. Both the Stevedores and the Union deemed the dispute to involve the application and interpretation of the collective bargaining agreement. That agreement provides that it is "intended to cover all matters affecting wages, hours, and other terms and conditions of employment," and establishes dispute resolution procedures incorporating the broadest possible designation of arbitrable issues: "matters under dispute which cannot be promptly settled between the parties." There are no limitations on the arbitrator's authority other than as to the effective date of "any decision in favor of the Employee involving monetary aspects or discharge." Integral to this contractual dispute resolution procedure is a requirement that is, Respondents submit, dispositive of this case: Paragraph 17 of the agreement states, "it is the intention and purpose of all parties hereto that no provision or part of this Agreement shall be violative of any Federal or State law." Thus, in determining whether Wright was "qualified" for referral to work by the Union, an arbitrator would be required to apply any pertinent statutory standards, including those under the Americans with Disabilities Act, to that assessment. Wright's failure to pursue his remedies under that agreement is, it is respectfully submitted, fatal to his claims, as the courts below have held. Therefore, even in the absence of controlling precedent in the Fourth Circuit, the determinations of the Magistrate Judge, the District Judge, and the Fourth Circuit should not be disturbed.

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[3] "During the term of this Agreement, the employer agrees that there shall be no lockouts of the members of the Union. . . ." [J.A. 159.]

Throughout the course of the proceedings below, Petitioner attempted to argue that *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir.), *cert. denied*, __ U.S. __, 117 S. Ct. 432, 136 L. Ed. 2d 330 (1996), was wrongly decided. Following the denial of certiorari in the *Austin* case, Petitioner turned to the fallback position that *Austin* was distinguishable from the facts presented here. The Petition presented to this Court represents a return to the first argument, with Petitioner positing that, irrespective of the merits of his own case, employment discrimination claims are never subject to arbitration under a collective bargaining agreement. However, Petitioner's case is not the appropriate vehicle for such an analysis, as the discussion below demonstrates.

I.

THE "CONFLICT" IS NOT BETWEEN THE DECISION BELOW AND THOSE OF OTHER COURTS.

Both § 118 of the Civil Rights Act of 1991, Pub. L. 102-166, § 118, 105 Stat. 1071, 1081 (Nov. 21, 1991) and § 513 of the Americans with Disabilities Act, 42 U.S.C. § 12212, Pub. L. 101-336, Title V, § 513, 104 Stat. 377 (July 26, 1990), encouraged the use of alternative dispute resolution processes, including arbitration, for the resolution of disputes arising under the ADA. *See generally*, Keene, "Collective Bargaining and Compulsory Arbitration of Americans With Disabilities Act Claims," 48 Lab. L.J. 738 (1997) (advocating arbitration of ADA claims); Cole, "A Funny Thing Happened on the Way to the (Alternative) Forum: Reexamining *Alexander v. Gardner-Denver* in the Wake of *Gilmer v. Interstate/Johnson Lane Corp.*," 1997 B.Y.U.L. Rev. 591 (1997) (expressing view that *Alexander* is not persuasive as a precedent); Note, "Compulsory Arbitration in the Unionized Workplace: Reconciling *Gilmer, Gardner-Denver* and the Americans with Disabilities Act," 37 B.C.L. Rev. 479 (1996) ("compelling arbitration of ADA claims under . . . collective bargaining agreement is a sensible and reasonable approach"); *and compare*, Hodges, "Mediation and the Americans with Disabilities Act," 30 Ga. L. Rev. 431 (1996). A contrary view is expressed in Coleman & Vasquez, "Mandatory Arbitration of Statutory Issues Under Collective

Bargaining: *Austin* and its Progeny," 48 Lab. L.J. 703 (1977). This Congressional endorsement of arbitration is one of the foundation blocks for the Fourth Circuit's decision in *Austin*, which also involved an ADA claim. After all, a determination of whether an employee is "qualified" to perform a particular job is the "bread and butter" of traditional labor arbitration. This factual distinction demonstrates that much of the alleged "conflict among the circuits" presented by Petitioner is, in fact, inaptly characterized, as can be seen from simple reference to the issues presented in the other seven cases cited by Petitioner:

Tran v. Tran, 54 F.3d 115 (2d Cir. 1995), *cert denied*, __ U.S. __, 116 S. Ct. 1412, 134 L. Ed. 2d 542 (1996), decided prior to *Austin*, arose under the Fair Labor Standards Act. The Second Circuit, adhering to the rationale of *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981), held that such statutory claims were not subject to arbitration under a collectively-bargained grievance procedure. *Tran* was considered by the panel majority in *Austin* as dissimilar to the issues presented to the Fourth Circuit in that case, and the court's analysis in that regard rejects the notion that *Tran* and *Austin* produced a "conflict in the circuits." 78 F.3d at 882 n.2.[4]

Cole v. Burns International Security Services, 105 F.3d 1465 (D.C. Cir. 1997) is supportive of the position of the Respondents. After an exhaustive analysis of the many ways in which collective bargaining arbitration procedures are *more* conducive to the protection of employee rights than is the case in other forms of employment arbitration, the court in *Cole* espoused a post-arbitration judicial review which would be "sufficiently rigorous to ensure that arbitrators have properly interpreted and applied statutory law." 105 F.3d 1487. *Cole*,

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[4] The petition for certiorari in *Austin*, which relied upon the *Tran/Austin* "conflict," was denied. *See* 65 U.S.L.W. 3190 (Aug. 28, 1997), set out *infra* at n.6.

therefore, supports, rather than criticizes, a procedure under which collectively bargained arbitration is the first step in the adjudication of employment discrimination claims.

Likewise, the question of the relative jurisdiction of labor arbitrators and federal district courts over employment discrimination claims was presented only tangentially in the other appellate decisions cited by Petitioner. For example, neither the collective bargaining agreement nor a copy of the District Court's order refusing to direct that plaintiff's sexual harassment claims be arbitrated was a part of the appellate record in *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1452 n.1, 1454 n.2 (10th Cir.), *petition for cert. filed*, 66 U.S.L.W. 3137 (Aug. 6, 1997), while in *Varner v. National Supermarkets, Inc.*, 94 F.3d 1209, 1213 (8th Cir. 1996), *cert. denied*, __ U.S. __, 117 S. Ct. 946, 136 L. Ed. 2d 835 (1997), also a sexual harassment case, the court disposed of the employer's argument regarding exhaustion of grievance-and-arbitration procedures by simple reference to *Alexander v. Gardner-Denver Co.*, 415 U.S. 147 (1974) and *Stacks v. Southwestern Bell Yellow Pages, Inc.*, 27 F.3d 1316 (8th Cir. 1994).[5] The extensive discussion of jurisdictional issues in *Penny v. United Parcel Service*, 128 F.3d 408 (6th Cir. 1997), arose on a contention that the Court of Appeals was without jurisdiction to entertain a plaintiff's appeal of the dismissal of his ADA/retaliation claims. The Sixth Circuit blazed no new trails, merely adopting the holdings in *Brisentine v. Stone & Webster Engineering Corp.*, 117 F.3d 519 (11th Cir. 1997), and *Pryner v. Tractor Supply Co.*, 109 F.3d 354 (7th Cir.), *cert. denied*, __ U.S. __, 118 S. Ct. 294, 139 L. Ed. 2d 227 (1997), and citing *Harrison, Varner and Tran*. *Penny*, 128 F.3d at 411-14. *Brisentine*, 117 F.3d at 522-26, in turn, opted for the Seventh Circuit's *Pryner* rationale rather than the Fourth Circuit's holding in *Austin*.

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[5] The *Stacks* decision refused to give "any weight" to an arbitration decision finding that the plaintiff had been dismissed for just cause, citing only *Alexander*. 27 F.3d 1326 n.3.

Consequently, the only reasoned resolutions of the general issue — whether so-called "statutory" claims on subject to compulsory arbitration under a collective bargaining agreement are those found in Chief Judge Posner's opinion in *Pryner* and in Judge Widener's opinion in *Austin*. Both of these cases were the subject of petitions for certiorari, and both petitions were denied.[6]

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[6] Issues presented to this Court in the petitions in *Austin* and in *Pryner* framed the question as follows:

> Did *Gilmer*. . . , holding that agreement by individual security industry employee for arbitration of claims based on statutory anti-discrimination right is enforceable, overrule or limit line of cases beginning with *Alexander*. . . , holding that individual employee is entitled to pursue his own judicial cause of action to vindicate statutory anti-discrimination (or other individual employee protection) right even if applicable collective bargaining agreement grievance/arbitration procedure is also available to employee?

(*Austin*, No. 96-337, filed Aug. 28, 1996, 65 U.S. L.W. 3190);

> Is voluntary agreement to arbitrate federal statutory employment discrimination claims enforceable under *Gilmer*. . . notwithstanding that it is part of collective bargaining agreement?

(*Pryner*, No. 96-1830, filed May 16, 1997, 65 U.S.L.W. 3803).

By contrast, the petitions in *Varner* and *Harrison* have raised the question of arbitration as only one of several issues upon which review was sought:

(Cont'd)

The Petition now before the Court concedes that it is no more than a request for reconsideration of the denial of certiorari in *Austin*. While the "question presented" is couched in terms of review of the "holding" of "the court below," the body of the Petition is devoted to the proposition that *Austin* was wrongly decided: *see, e.g.*, Petition pp. 9-10, 16-17, 18-20. This Court has turned down the invitation to revisit this subject three times, and there is no basis upon which a different result should be reached here.

II.

PETITIONER'S ATTITUDE TOWARD THE FOURTH CIRCUIT IS UNWARRANTED.

An advocate's zeal in representing a client should never be allowed to foster incivility or a lack of professionalism. Unfortunately, the Petition in this case crosses that line. The sarcastic hyperbole employed in phrases such as "far from giving this Court's decision in *Alexander* a decent burial, the majority of the panel in *Austin* addressed *Alexander* only in a footnote" [Petition, p. 16] reaches its farthest extreme in Footnote 10 on page 19, which characterizes that court as intent upon

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(Cont'd)

> (1) [of 2] Should Supreme Court resolve conflict between Eighth Circuit's decision in this case and Fourth Circuit's decision in *Austin* . . .?

(*Varner*, No. 96-802, filed Nov. 21, 1996, 65. U.S.L.W. 3420).

> "(5)" [of 5] Can collective bargaining agreement compel employer to arbitrate claim that she may have under federal statute, such as Title VII?

(*Harrison*, No. 97-232, filed Aug. 6, 1997, 66 U.S.L.W. 3161, 3162).

"curtail[ing] rights under employment discrimination statutes." But the United States Court of Appeals for the Fourth Circuit is not an errant child deserving of punishment. If that Court were, in fact, acting in conscious disregard of this Court's pronouncements, it is difficult to understand how it could have decided *Brown v. Trans World Airlines*, 127 F.3d 337 (4th Cir. 1997) as it did. *Brown*, unlike *Austin*, involved a collective bargaining agreement negotiated under the Railway Labor Act, rather than the National Labor Relations Act. Accordingly, the Fourth Circuit followed this Court's decision in *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246 (1994) by holding that where the agreement in question does not refer to statutory provisions, and "there is no indication that the arbitrator would be bound to follow" interpretation under Federal antidiscrimination legislation, a plaintiff was not required to pursue her remedies under the mandatory arbitration provisions of the agreement arising out of alleged violations of Title VII and the Family and Medical Leave Act. The court stressed that, just as in *Austin*, it was reaching its conclusion "as a matter of contract interpretation." 127 F.3d at 341. In other words, the decisions in *Austin*, *Brown*, and *Wright* are all grounded in the language of the particular collective bargaining agreement in question, and a contention that such analysis is somehow at odds with this Court's precedents is untenable.

III.

THERE IS NO REQUIREMENT IN THE LAW THAT AN EMPLOYEE "PERSONALLY WAIVE HIS RIGHT TO A JUDICIAL TRIAL" IN ORDER TO BE FREED OF A REQUIREMENT TO FOLLOW A CONTRACTUAL GRIEVANCE-AND-ARBITRATION PROCEDURE.

The overt hostility of Petitioner to the entire collective bargaining process, manifested in his argument that a union is

incapable of representing the interests of individuals within the bargaining unit it represents, deserves only brief discussion. First, this is an issue which was not the gravamen of any of the decisions below, nor could it have been: in his Docketing Statement filed with the Fourth Circuit on January 2, 1997, one of the purported questions to be addressed on appeal was, "plaintiff never personally agreed to arbitrate statutory claims and he is not a party to the Collective Bargaining Agreement." This issue was abandoned on appeal, as was noted in the Brief of Appellees at page 21. Additionally, a fair reading of the "question presented" in the instant Petition does not permit this argument to be made.

Moving beyond the impermissability of a consideration of this argument on procedural grounds, it is strange to see Petitioner contending that no arbitration agreement is enforceable unless it was specifically bargained for by the individual. After all, the plaintiff in *Gilmer* signed a standard-form registration application, containing an agreement to "arbitrate any dispute, claim or controversy," which in turn incorporated by reference a New York Stock Exchange rule requiring arbitration of "[a]ny controversy . . . arising out of the employment or termination of employment of such registered representative." *Gilmer v. Interstate/Johnson Lane Corp.*, 895 F.2d 195, 196 n.1 (4th Cir. 1990). While the lack of "individual agreement" has been used by some courts in creating exceptions to the *Gilmer* rationale,[7] the persuasive force of such an argument fails completely when carried into the context of a union contract. Certainly, there may be instances in which arbitration under a collective bargaining agreement poses difficulties for the union in its attempted balance of collective and individual rights, such as an accusation of sexual harassment by one bargaining unit employee against another. But where discharge, reinstatement, and other "individual" claims are presented, there is no basis upon it could be said that the quality and vigor of the union's representation of the individual has been hampered either in the negotiation or in the administration of the agreement. In short, Petitioner's argument is anachronistic, acting upon a presumption that unions will engage in discrimination and unfair representation. In light of Petitioner's total unwillingness, at any point in this case, to accuse his union of unfair representation, the attempted interjection of his "individual" rights into this case is unworthy of further discussion.

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[7] *E.g.*, *Prudential Insurance Co. v. Lai*, 42 F.3d 1299 (9th Cir. 1994), *cert. denied*, __ U.S. __, 116 S. Ct. 61, 133 L. Ed. 2d 24 (1995); and *cf.*, *Martin v. Dana Corp.*, __ F.3d __, 75 Fair Empl. Prac. Cas. (BNA) 870 (3d Cir. 1997) (Title VII claim not subject to arbitration where only union can "initiate and prosecute claims under the collective bargaining agreement").

CONCLUSION

The court below reviewed the provisions of the collective bargaining agreement and determined that there was no legitimate basis upon which Petitioner should have been allowed to circumvent the requirements of filing and pursuing a grievance under his collective bargaining agreement. The issue which would have been presented, had such arbitration taken place, was whether petitioner was "qualified" to return to work. The arbitrator's decision was contractually required to comport with all applicable federal and state laws. Given the genesis of Petitioner's complaint, it was obvious that contractual interpretation was contemplated, but the interpretation would necessarily have included an assessment of whether Petitioner was a "qualified individual with a disability" under the Americans with Disabilities Act. This Court's Rules specify that

> [a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

(S. Ct. Rule 10.) The findings below as to the interpretation of the collective bargaining agreement produced the results reached by the Fourth Circuit. Review of those findings is unwarranted, and the Petition should be denied.

Respectfully submitted,

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Supreme Court, U. S
FILED
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(3)

No. 97-889

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1997

CEASAR WRIGHT

Petitioner,

v.

UNIVERSAL MARITIME SERVICE CORP.;
STEVENS SHIPPING & TERMINAL COMPANY;
STEVEDORING SERVICES OF AMERICA;
RYAN-WALSH, INC.;
STRACHAN SHIPPING COMPANY;
CERES MARINE TERMINALS, INC.; and
SOUTH CAROLINA STEVEDORES ASSOCIATION,

Respondents.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Fourth Circuit

PETITIONER'S REPLY BRIEF

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Respondents Provide No Basis To Deny The Writ

The Respondents' "Reasons for Denying the Writ" are wholly insubstantial.[1] The first reason appears to be an assertion that there is no conflict between the circuits (page 7). But the Brief concedes on pages 9-10 that there is a clear conflict between the rationale of *Austin v. Owens-Brockway Glass Container Co.*, 78 F.3d 875 (4th Cir.), *cert. denied*, 117 S.Ct. 432 (1996), and the rationale followed by all other circuit courts of appeal. Indeed, since Petitioner filed his initial Petition in this Court, the Third Circuit, in *Martin v. Dana Corp.*, 156 L.R.R.M. 3137 (3d Cir. 1997) (not officially reported), has joined the five circuits that had previously refused to follow *Austin* as to employment discrimination claims of workers represented by unions. Contrary to Respondents' assertion (page 10), several courts of appeals have published reasoned opinions that have adhered to *Alexander v. Gardner-Denver Corp.*, 415 U.S. 36 (1974), and have rejected *Austin*. *Austin* rests solely on a strained interpretation of statutory language that "where appropriate and to the extent authorized by law, ... arbitration ... is encouraged to resolve disputes." Judge Posner accurately observed in *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 363 (7th Cir.), *cert. denied*, 118 S.Ct. 294 (1997), that "These provisions [were] a polite bow to the popularity of 'alternative dispute resolution,'" but Judge Posner noted this language was not intended to establish mandatory arbitration under labor agreements. Legislative history cited in *Austin* makes clear that Congress endorsed voluntary arbitration, not mandatory arbitration. 78 F.3d at 881-82.

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[1] The Respondent's Statement of Facts implies that Petitioner's conduct was somehow inconsistent. In fact, in May, 1994, Petitioner's physician thought he would be permanently disabled, but petitioner's condition later unexpectedly improved, as demonstrated by x-rays taken in January, 1995. (Petition at 4) Petitioner returned to full-duty work without incident for ten days before the Employers decided to reject him. In a classic stereotypical response that the Americans with Disabilities Act was intended to prevent, the Employers then stated that "Once an individual is certified as permanently and totally disabled, he is no longer qualified to perform longshore work of any kind," without requesting an independent medical exam or other documentation.

Judge Posner, writing in *Pryner*, and every other circuit to address the issue, have shared Petitioner's concern about the appropriateness of exclusive union control of the prosecution of statutory discrimination complaints, which Respondents regard as "anachronistic" (page 14). Since labor unions must constantly resolve contract grievances, the apparatus of labor arbitration is very different from the procedures utilized in commercial arbitration, including employment arbitration for the stock broker who sued in *Gilmer v. Interstate / Johnson Lane Corp.*, 500 U.S. 20 (1991).

Throughout the grievance appeal process (sometimes even in arbitration), unions typically provide lay staff members to present the grievance. Unions not only do not provide attorneys, they invariably do not allow the worker's personal attorney to participate, because it is the union's grievance. Many labor grievance procedures (including the appeal process for the union here) provide that grievances will be resolved by a binding award from a labor-management panel, unless the panel deadlocks. Such panels are well versed in the practices

of the industry ("the law of the shop"), but they are untrained and inexperienced in resolving statutory claims ("the law of the land"). See *Alexander*, 415 U.S. at 57.

Therefore, this Court's concern in *Alexander* about the inferiority of the extremely informal procedures of labor grievances and arbitration to resolve complex matters arising under employment discrimination statutes continues to be valid today. Since *Alexander*, commercial arbitration has grown increasingly sophisticated. Businesses seeking to arbitrate complex commercial disputes, or individual employees arbitrating under *Gilmer* agreements, can select their own attorneys, can select an arbitrator trained in the law, can provide for a transcribed record of proceedings, and can request detailed written findings to discipline the arbitrator to follow the relevant law in resolving a statutory claim. In usual practice, none of these procedures is available in labor grievances today, any more than in 1974. 415 U.S. at 57-58.

Labor grievance and arbitration is primarily used to resolve a constant stream of relatively routine contract disputes. As this Court observed in *Alexander*, to raise the practice in the arbitral forum to "a standard that adequately insured effectuation of Title VII rights ... would tend to make arbitration a procedurally complex, expensive and time-consuming process." 415 U.S. at 59. In *Alexander*, this Court continued, "And judicial enforcement of ... a standard [that adequately insured effectuation of Title VII rights] would almost require courts to make de novo determinations of the employees' claims." *Idem.* This Court's observations about labor arbitration in 1974 remain equally valid today.

CONCLUSION

The decision below now conflicts, directly or in principle, with the decisions of eight other circuits, as well as with this Court's decisions in *Alexander* and *Gilmer*. The conflict will not go away. The Fourth Circuit has expressed its determination to adhere to *Austin*, in enforcing "general" arbitration clauses like the one in this case, until this Court corrects it. As shown by the insubstantial response in the Respondents' Brief in Opposition, there are no good reasons to change the rule that this Court has articulated in *Alexander* and its progeny. This Court should grant the writ and set this matter for briefing and argument, unless the Court finds the opposition so insubstantial that summary reversal on the Petition is deemed more appropriate.

Respectfully submitted,

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No. 97-889 (9)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

CEASAR WRIGHT,
Petitioner,
v.
UNIVERSAL MARITIME SERVICE CORP., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

JOINT APPENDIX

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Petition for Certiorari Filed November 26, 1997
Certiorari Granted March 2, 1998

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60 pp

TABLE OF CONTENTS

Item: **Page:**

1. Chronological List of Relevant Docket Entries

   United States District Court for the District of South Carolina, Charleston Division 2a

   United States Court of Appeals for the Fourth Circuit 7a

2. Complaint 11a

3. Answer of All Defendants 21a

4. Excerpts from Collective Bargaining Agreement 36a

5. Statement of Material Facts Not in Dispute 50a

6. Motion to Compel Arbitration with Supporting Authorities (And Join Additional Party) ... 56a

Relevant Docket Entries

United States District Court for the District of South Carolina, Charleston Division

1/19/96	1	COMPLAINT; FILING FEE $120.00 RECEIPT #200-3411. Scheduling order due by 3/19/96 Service due by 5/18/96 for SC Stevedores Assoc, for Ceres Marine, for Strachan Shipping, for Ryan-Walsh Inc., for Stevedoring Services, for Stevens Shipping, for Universal Maritime (jwol) [Entry date 01/22/96]
2/28/96	9	ANSWER to Complaint by defendant Universal Maritime, defendant Stevens Shipping, defendant Stevedoring Services, defendant Ryan-Walsh Inc, defendant Strachan Shipping, defendant Ceres Marine, defendant SC Stevedores Assoc (Attorney Dennis J. Rhoad) (kwhi) [Entry date 02/29/96]
5/3/96	13	MOTION by plaintiff Ceasar Wright for partial summary judgment (mpas) [Entry date 05/06/96]
5/3/96	14	MEMORANDUM by plaintiff Ceasar Wright in support of [13-1] motion for partial summary judgment (mpas) [Entry date 05/06/96]
5/3/96	15	MOTION by all defendants' for summary judgment (mpas) [Entry date 05/06/96] [Edit date 05/06/96]

5/3/96	16	MEMORANDUM by all defendants'[sic] in support of [15-1] motion for summary judgment (mpas) [Entry date 05/06/96]
5/3/96	17	Stipulation documents by plaintiff Ceasar Wright, defendant Universal Maritime, defendant Stevens Shipping, defendant Stevedoring Services, defendant Ryan-Walsh Inc, defendant Strachan Shipping, defendant Ceres Marine, defendant SC Stevedores Assoc (mpas) [Entry date 05/06/96]
5/17/96	18	MEMORANDUM by defendant Universal Maritime in opposition to [13-1] motion for partial summary judgment (mpas)
5/20/96	19	RESPONSE by plaintiff Ceasar Wright to [15-1] motion for partial summary judgment (mpas)
5/20/96	20	STATEMENT by plaintiff Ceasar Wright in opposition to [15-1] motion for summary judgment (mpas)
5/20/96	21	STATEMENT OF MATERIAL FACT[S] NOT IN DISPUTE by plaintiff Ceasar Wright (mpas)
5/20/96	22	DECLARATION by plaintiff Ceasar Wright Re: [15-1] motion for summary judgment (mpas)
5/22/96	--	Motion hearing re: under advisement Report and Recommendation to be issued within 10 days [15-1] motion for summary judgment, under advisement Report and Recommendation to be issued within 10 days [13-1] motion for partial summary judgment, Pending not resolved [10-1] motion to compel discovery Motion hearing held before USMg Judge Robert S. Carr/Gilbert O'Brien, ESR (mpas) [Entry date 05/23/96] [Edit date 05/23/96]
6/14/96	24	ORDER, for report and recommendations that action be dismissed without prejudice for want of jurisdiction (signed by Magistrate Judge Robert S. Carr) (mpas)
6/27/96	26	MEMORANDUM [OBJECTIONS] by plaintiff Ceasar Wright in opposition to [24-1] order for report and recommendations regarding summary judgment; that action be dismissed without prejudice for want of jurisdiction (mpas) [Entry date 06/28/96]
6/27/96	27	MEMORANDUM by plaintiff Ceasar Wright in opposition to Report and recommendation on cross motions for summary judgment filed 6/17/96 (mpas) [Entry date 06/28/96]
7/9/96	29	REPLY by defendants, Universal Maritime, Stevens Shipping, Stevedoring Services, Ryan-Walsh Inc, Strachan Shipping, Marine to Plaintiff's objections to Report and Recommendation of Magistrate Judge (rnie)
9/27/96	30	ORDER adopting the Magistrate's Report and Recommendation; granting [15-1]

		motion for summary judgment (signed by Judge David C. Norton (mpas) [Entry date 10/02/96]
10/2/96	31	JUDGMENT for defendant Universal Maritime, defendant Stevens Shipping, defendant Stevedoring Services, defendant Ryan-Walsh Inc, defendant Strachan Shipping, defendant Ceres Marine, defendant SC Stevedores Assoc against plaintiff Ceasar Wright; adopting the Magistrate Report and Recommendation (mpas)
10/2/96	--	Case closed (mpas)
10/11/96	32	MOTION by plaintiff Ceasar Wright to vacate [31-1] judgment order to reconsider order granting summary judgment (mpas) [Entry date 10/15/96]
10/25/96	34	MEMORANDUM by defendant Universal Maritime, defendant Stevens Shipping, defendant . Stevedoring Services, defendant Ryan-Walsh Inc, defendant Strachan Shipping, defendant Ceres Marine, defendant SC Stevedores Assoc in opposition to [30-1] order; and to plaintiff's motion to vacate judgment (mpas)
10/31/96	35	REPLY MEMORANDUM by plaintiff Ceasar Wright to [32-1] motion to vacate [31-1] judgment order to reconsider order granting summary judgment (mpas) [Entry date 11/06/96]

11/6/96	--	Motion hearing re: [32-1] motion to vacate [31-1] judgment order to reconsider Order granting summary judgment at 3:00 11/19/96 (obri)
11/8/96	36	MOTION by plaintiff Ceasar Wright to conform record as to Notice of Right to Sue (Stevedoring Services of America) or add Stevedoring Services of Americas a party defendant (mpas) [Entry date 11/12/96]
11/27/96	37	MOTION with memorandum in support by plaintiff Ceasar Wright to compel arbitration and joining additional party International Longshoremen's Association and Local 1422, International Longshoremen's Association (mpas)
12/2/96	--	Oral order:MOTION HEARING HELD [32-1] motion to vacate [31-1] judgment order to reconsider Order granting summary judgment taken under advisement (by Judge David C. Norton/Gilbert O'Brien, ESR) (obri)
12/2/96	38	ORDER denying [32-1] motion to vacate [31-1] judgment order to reconsider Order granting summary judgment (signed by Judge David C. Norton) (mpas) [Entry date 12/06/96]
12/13/96	39	MEMORANDUM by defendant Universal Maritime, defendant Stevens Shipping, defendant . Stevedoring Services, defendant Ryan-Walsh Inc, defendant Strachan

		Shipping, defendant Ceres Marine, defendant SC Stevedores Assoc in opposition to [37-1] motion to compel arbitration and joining additional party International Longshoremen's Association and Local 1422, International Longshoremen's Association (cmck) [Entry date 12/16/96]
12/19/96	40	NOTICE OF APPEAL by plaintiff Ceasar Wright Re: [38-1] order, [31-1] judgment order, [30-1] order Fee Status:PAID #200-4882 Transcript purchase order due on 12/29/96 (snel) [Entry date 12/20/96]

United States Court of Appeals for the Fourth Circuit

12/30/96	Civil case docketed. (wu)
1/2/97	Docketing notice issued. [96-2850] (wu)
1/6/97	Docketing statement filed by Appellant Ceasar Wright [2487903-1] T/S needed: y; T/S already on file: n [96-2850] (wu)
1/6/97	Transcript order filed for Gilbert O'Brien . [96-2850] (wu)
1/10/97	Counsel of record form filed by Ray P. McClain for Appellant Ceasar Wright. (wu)
1/10/97	Counsel of record form filed by Charles Archibald Edwards for Appellee Universal Maritime, Appellee Stevens Shipping,

	Appellee Stevedoring Services, Appellee Ryan-Walsh Inc, Appellee Strachan Shipping Co, Appellee Ceres Marine Term, Appellee SC Stevedores Assoc. (wu)
1/10/97	Counsel of record form filed by Jeffrey M. Hahn for Appellee Universal Maritime, Appellee Stevens Shipping, Appellee Stevedoring Services, Appellee Ryan-Walsh Inc, Appellee Strachan Shipping Co, Appellee Ceres Marine Term, Appellee SC Stevedores Assoc. (wu)
1/23/97	Certification transcript filed in district court by Gilbert O'Brien on 01/15/97. [96-2850] (wu)
1/23/97	Briefing order filed. [96-2850] Appellant(s) brief/joint appendix due 3/4/97 for Ceasar Wright . (wu)
2/3/97	Certification of ROA complete and retained in the District Court. [96-2850] (wu)
2/25/97	Motion filed by Appellant Ceasar Wright to extend time to file appellant(s) brief/appendix until 4/3/97 [2516684-1] [96-2850] (wu)
2/26/97	CLERK ORDER FILED granting motion to ext time to file a's br/apx [2516684-1] Appellant(s) brief/joint appendix now due 3/25/97 for Ceasar Wright Conf aty recomm?: n. Number of days granted: 21. Copies to all counsel. [96-2850] (wu)

3/25/97	Brief and joint appendix filed by Appellant Ceasar Wright. Type of Service: HD Copies of brief: 8 # pages: 27 Copies of apx: 6 # pages: 284. Sufficient [Y/Nl: y 2-sided copying: y [96-2850] Appellee brief due 4/24/97 for SC Stevedores Assoc, for Ceres Marine Term, for Strachan Shipping Co, for Ryan-Walsh Inc, for Stevedoring Services, for Stevens Shipping, for Universal Maritime . (aww)
4/22/97	Brief filed by Appellee Universal Maritime, Appellee Stevens Shipping, Appellee Stevedoring Services, Appellee Ryan-Walsh Inc, Appellee Strachan Shipping Co, Appellee Ceres Marine Term, Appellee SC Stevedores Assoc. Type of Service: CD Copies: 8 # pages: 53. Sufficient [Y/N]: y. [96-2850] (aww)
5/2/97	Case tentatively calendared for oral argument Term: July Place: Chas,Bea,Wil. SUBMISSION DEADLINE: 05/12/97. (jle)
5/9/97	Reply brief filed by Appellant Ceasar Wright. Type of Service: HD Copies of brief: 8 # pages: 21. Sufficient [Y/N]: y. . [96-2850] (aww)
5/19/97	Case calendared for oral argument. [96-2850] (jc)
7/3/97	Supplemental authorities (FRAP 28(j)) filed by Appellant Ceasar Wright [2592083-1] . [96-2850] (aww)

7/7/97	Oral argument heard. Courtroom Deputy: JLE. [96-2850] (jc)
7/29/97	Unpublished per curiam opinion filed. [96-2850] (wu)
7/29/97	Judgment order filed. Decision: AFFIRMED . [96-2850] (wu)
8/5/97	Insufficient hill of costs filed by Appellee Universal Maritime, Appellee Stevens Shipping, Appellee Stevedoring Services, Appellee Ryan-Walsh Inc, Appellee Strachan Shipping Co, Appellee Ceres Marine Term, Appellee SC Stevedores Assoc. (Insufficiency: certificate of service) Remedy by: 08/12/97. [96-2850] Follow-up due 8/12/97. (wu)
8/8/97	Bill of Costs made sufficient by appellees How?: Bill of costs with certificate of service filed . [96-2850] (wu)
8/20/97	Bill of costs taxed by clerk in the amount of $ 35.10. Copies to counsel. [2617264-1] [96-2850] (wu)
8/20/97	Mandate issued. [96-2850] (wu)
12/4/97	Supreme Court notice that petition for certiorari was filed on 11/26/97. Spct No.: 97-889 Spct Pty 1: Ceasar Wright Spct Pty 2: Univ Maritime Svc Corp, et al. [96-2850] (cw)

COMPLAINT

NATURE OF THE ACTION

1. This is an employment discrimination action arising out of the employment practices of the Defendants. The Plaintiff seeks relief which includes back pay and benefits, compensatory damages, punitive damages, costs and attorney's fees. The case is brought in this Court pursuant to the provisions of the Americans with Disabilities Act, 42 U.S.C. §12101 et seq. ["the ADA"].

JURISDICTION

2. This Court has jurisdiction in this action pursuant to 28 U.S.C. §§1331, 1337 and 1343; and 42 U.S.C. §12101 et seq., especially §12117(a).

PARTIES

3. Plaintiff CEASAR WRIGHT is a male citizen of the United States and a resident of the County of Charleston, State aforesaid.

4. Defendant Universal Maritime Service Corp. (hereinafter "UNIVERSAL") is a New York corporation regularly engaging in the business of stevedoring in the Port of Charleston, South Carolina. It has offices that regularly conduct this business in Charleston County. Plaintiff is informed and believes that it had more than five hundred (500) employees in each of twenty or more calendar weeks in the current or preceding calendar year. It was an "employer" of CEASAR WRIGHT, within the meaning of 42 U.S.C. §12111(5)(A), in January, 1995, before it refused to accept him.

5. Defendant Stevens Shipping & Terminal Company (hereinafter "STEVENS") is a Georgia corporation regularly engaging in the business of

stevedoring in the Port of Charleston, South Carolina. It has offices that regularly conduct this business in Charleston County. Plaintiff is informed and believes that it had more than five hundred (500) employees in each of twenty or more calendar weeks in the current or preceding calendar year. It was an "employer" of CEASAR WRIGHT, within the meaning of 42 U.S.C. §12111(5)(A), in January, 1995, before it refused to accept him.

6. Defendant Stevedoring Services of America, Inc. (hereinafter "SSA") is a corporation regularly engaging in the business of stevedoring in the Port of Charleston, South Carolina. It has offices that regularly conduct this business in Charleston County. Plaintiff is informed and believes that it had more than five hundred (500) employees in each of twenty or more calendar weeks in the current or preceding calendar year. It was an "employer" of CEASAR WRIGHT, within the meaning of 42 U.S.C. §12111(5)(A), in January, 1995, before it refused to accept him.

7. Defendant Ryan-Walsh, Inc. (hereinafter "RYAN-WALSH"), is a Alabama corporation regularly engaging in the business of stevedoring in the Port of Charleston, South Carolina. It has offices that regularly conduct this business in Charleston County. Plaintiff is informed and believes that it had more than five hundred (500) employees in each of twenty or more calendar weeks in the current or preceding calendar year. It was the "employer" of CEASAR WRIGHT, within the meaning of 42 U.S.C. §12111(5)(A), January, 1995, before it refused to accept him.

8. Defendant Strachan Shipping Company, Inc. (hereinafter "STRACHAN") is a Delaware corporation regularly engaging in the business of stevedoring in the Port of Charleston, South Carolina. It has offices that

regularly conduct this business in Charleston County. Plaintiff is informed and believes that it had more than five hundred (500) employees in each of twenty or more calendar weeks in the current or preceding calendar year. It was the "employer" of CEASAR WRIGHT, within the meaning of 42 U.S.C. §12111(5)(A), in January, 1995, before it refused to accept him.

9. Defendant Ceres Marine Terminals, Inc. (hereinafter "CERES") is a Maryland corporation regularly engaging in the business of stevedoring in the Port of Charleston, South Carolina. It has offices that regularly conduct this business in Charleston County. Plaintiff is informed and believes that it had more than five hundred (500) employees in each of twenty or more calendar weeks in the current or preceding calendar year. It was the "employer" of CEASAR WRIGHT, within the meaning of 42 U.S.C. §12111(5)(A), in January, 1995, before it refused to accept him.

10. Defendant South Carolina Stevedores Association, Inc. (hereinafter "the ASSOCIATION") is a South Carolina corporation. It has offices that regularly conduct this business in Charleston County. It was an "agent" of the "employers" of CEASAR WRIGHT, within the meaning of 42 U.S.C. §12111(5)(A), through the time the employers refused to accept Plaintiff in January, 1995, and continuing to the present.

STATEMENT OF FACTS

11. Plaintiff has been employed in the longshore industry since 1970. He is a member of Local 1422, International Longshoremen's Association, AFL-CIO [hereinafter Local 1422]. He has been a member of that union since 1970.

12. Local 1422 operates a "hiring hall" for stevedoring companies in the Port of Charleston.

Through the hiring hall, Local 1422 provides labor to companies, including the Defendant companies, for loading and unloading cargo on seagoing vessels, and other stevedoring work, in the Port of Charleston, State of South Carolina.

13. Through the hiring hall, Plaintiff and other longshoremen who report for work are assigned each day to work on gangs, as requested by the stevedoring employers who obtain labor through the hiring hall. Since the employers' need for labor varies from day to day, a longshoreman with substantial seniority, such as Plaintiff has, will, in the course of a month, be assigned to work for each of the Defendant companies that perform stevedoring services in the Port of Charleston.

14. On or about February 18, 1992, Plaintiff suffered a severe fracture of his right heel in the course of his employment with Defendant STEVENS.

15. In the course of his recuperation, Plaintiff's treating physician and other examining physicians expressed the view that Plaintiff would be, due to his physical impairment and disability, permanently and totally disabled from performing the duties of longshore employment.

16. Defendant STEVENS rejected the medical opinions that Plaintiff was permanently and totally disabled.

17. In May, 1994, Plaintiff entered into a settlement of a worker's compensation claim with Defendant Stevens Shipping Company that was equivalent only to a small decrease in his expected work-life prior to retirement. This settlement was approved by the Department of Labor on June 10, 1994.

18. Subsequent to July, 1994, Plaintiff's physical

condition improved.

19. Plaintiff obtained the permission of his treating physician to attempt to return to work.

20. On January 2, 1995, Plaintiff presented himself at the hiring hall of Local 1422; Plaintiff offered himself as available for work without restriction or accommodation.

21. From January 2, 1995, through January 11, 1995, Plaintiff was referred by Local 1422 to work with several stevedoring companies, including Defendants UNIVERSAL, RYAN-WALSH, STRACHAN, and CERES. Plaintiff performed all duties assigned to him by each of these employers; none of these employers complained or objected in any way to the manner in which Plaintiff performed his duties.

22. On or about January 11, 1995, Plaintiff is informed and believes, Defendants, through their representatives, met and agreed to refuse to accept future work referrals for Plaintiff from Local 1422.

23. On or about January 12, 1995, Defendants advised Benjamin Flowers, President of Local 1422, that none of the Defendants would accept Plaintiff on a work referral from Local 1422, and requested that Local 1422 cease referring Plaintiff to them for work. Local 1422 acquiesced in this request.

24. Plaintiff is informed and believes that he has been refused employment by the Defendant employers due to the employers' perception that Plaintiff is not physically able to do the job that Local 1422 referred him to do on a stevedoring gang, in spite of the fact he had performed these duties satisfactorily from January 2, 1995, through January 11, 1995, for several of the Defendants.

25. Plaintiff is informed and believes that the Defendant employers refused to allow Plaintiff to work because he had previously been reported by physicians to be permanently disabled from longshore employment, though he subsequently received a release from his treating physician to attempt to return to longshore work.

26. Plaintiff is able to perform the essential duties of the positions for which Local 1422 would refer him for employment, without accommodation, as he had from January 2, 1995, through January 11, 1995. If any problems of performance develop in the course of Plaintiff's employment, he is informed and believes that such problems may be redressed by reasonable accommodation.

27. Therefore, Plaintiff has been discriminated against in the terms and conditions of employment by the Defendants, in violation of the Americans with Disabilities Act, 42 U.S.C. Sec. 12101 et seq..

28. As set forth hereinabove, on or about February 18, 1992, Plaintiff sustained on-the-job injuries to his heel. The injuries to his heel are permanent in nature and constitute a permanent impairment to many of his major life activities, within the meaning of the Americans with Disabilities Act. However, that impairment does not now interfere with his performance of the essential duties of his position of employment. Plaintiff is, therefore, a "qualified individual with a disability" as defined in 42 U.S.C. §12111(8), and other relevant statutes and regulations.

29. Plaintiff is informed and believes that Defendants perceived him to be substantially impaired in his ability to work by reason of his physical ailments, although this perception was no longer accurate when he returned to work in January, 1995.

30. On information and belief, the Defendants

negligently and recklessly, or willfully and intentionally, refused to allow Plaintiff to work because of their perception of his disability.

31. As a result of Defendants' refusal to accept Plaintiff on work referrals, Plaintiff has suffered loss of income, fringe benefits, retirement and other benefits and has suffered other financial loss.

32. Plaintiff is informed and believes that he will never be able to obtain substitute employment with earnings comparable to that from which he has been refused by Defendants.

33. As a result of his termination, Plaintiff has suffered pain and suffering, humiliation, anxiety, and mental and emotional distress.

CONDITIONS PRECEDENT AND EXHAUSTION OF REMEDIES

34. On January 27, 1995, Plaintiff CEASAR WRIGHT, through his attorney, mailed original sworn Charges of Discrimination to the South Carolina Human Affairs Commission and to the Equal Employment Opportunity Commission, naming the Defendants Universal Maritime, Service Corp., Stevens Shipping & Terminal Company, Inc., and Stevedoring Services of America, Inc., herein as Respondents. The said Charges asserted discrimination on the basis of physical disability or perceived impairment. [Copies of each charge are attached hereto as Exhibit A.]

35. On July 7, 1995, Plaintiff CEASAR WRIGHT, through his attorney, mailed original sworn Charges of Discrimination to the South Carolina Human Affairs Commission and to the Equal Employment Opportunity Commission, naming the Defendants South Carolina Stevedores Association, Inc., Ryan-Walsh, Inc., Strachan Shipping Co., Inc., and Ceres Marine Terminals, Inc., herein as Respondents. The said Charges asserted discrimination on the basis of physical disability or perceived impairment. [Copies of each charge are attached hereto as Exhibit B.]

36. On October 26, 1995, the Equal Employment Opportunity Commission issued Notices of Right to Sue to Plaintiff. This suit is brought, in a timely fashion, pursuant to those Notices of Right to Sue. [Copies of said Notices are attached hereto as Exhibit C.]

37. CEASAR WRIGHT has fully complied with all conditions precedent for jurisdiction under the Americans with Disabilities Act and other applicable law. 42 U.S.C. §12117(a).

38. Plaintiff has fully exhausted all administrative remedies required for this claim.

FOR A FIRST CAUSE OF ACTION

(Americans with Disabilities Act)

39. Plaintiff alleges and realleges the allegations contained in paragraphs 1 through 38 above with the same force and effect as though fully set forth herein.

40. By the acts and practices alleged above, and by other related acts and practices, the Defendants have violated Plaintiff's rights under the Americans with Disabilities Act, as amended, 42 U.S.C. §12112(a), in discriminating with respect to terms, conditions and privileges of employment, by refusing to accommodate his perceived impairment and instead refusing to allow him to work in the longshore industry in the Port of Charleston.

41. Defendants, acting in concert with one another, jointly and with or through Defendant ASSOCIATION, have agreed to exclude Plaintiff from

employment in the longshore industry in the Port of Charleston.

42. Defendants, acting in concert with one another, excluded Plaintiff from longshore employment, although they knew, because of his successful performance of duties from January 2 through January 11, 1995, that Plaintiff was no longer completely disabled from longshore employment.

43. Defendants, acting in concert with one another, consciously disregarded their obligations to Plaintiff under the Americans with Disabilities Act.

REMEDIES

44. The Plaintiff has no plain, adequate, or complete remedy at law to redress fully the wrongs alleged herein, and this action for permanent injunction and other relief is his only means of securing full and adequate relief. The Plaintiff is suffering and will continue to suffer irreparable injury from the Defendants' acts.

45. Based on the foregoing, Plaintiff is entitled to actual, compensatory, punitive, and other damages.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully prays that this Court enter judgment for him, and against Defendants UNIVERSAL, STEVENS, SSA, RYAN-WALSH, STRACHAN, CERES, and the ASSOCIATION, jointly and severally, as follows:

1. For back pay, in an amount to be proved at trial;

2. For the past and reasonably foreseeable future effects of discrimination upon his life and health insurance (or cost of previously insured health care costs),

pension and other employee fringe benefits, in an amount to be proven at trial;

3. Order that UNIVERSAL, STEVENS, SSA, RYAN-WALSH, STRACHAN, CERES, and the ASSOCIATION reinstate Plaintiff as eligible for hire as an employee with attendant rights and privileges as if he had been continuously employed; or, in the alternative, if reinstatement be found not to be feasible, to award front pay to him, at least through age 70.

4. For prejudgment interest on all amounts awarded as prayed herein;

5. For compensatory damages, in an amount to be proved at trial;

6. For punitive damages, in an amount to be proved at trial;

7. For the Plaintiff's costs, and reasonable attorney's fees, pursuant to all applicable provisions of law, including 42 U.S.C. §12117(a).

9. For such other and further relief as to the Court appears proper.

ANSWER OF ALL DEFENDANTS

FIRST DEFENSE

Defendants UNIVERSAL MARITIME SERVICE, CORP (hereinafter, "UNS"), STEVENS SHIPPING & TERMINAL COMPANY (hereinafter, "Stevens"), STEVEDORING SERVICES OF AMERICA (hereinafter, "SSA"), RYAN-WALSH, INC. (hereinafter, "Ryan-Walsh"), STRACHAN SHIPPING COMPANY (hereinafter, "Strachan"), CERES MARINE TERMINALS, INC. (hereinafter, Ceres"), and SOUTH CAROLINA STEVEDORES ASSOCIATION (hereinafter, "SCSA"), also collectively referred to hereinafter as "Defendants," answer the separately - numbered allegations of the Complaint of Plaintiff Ceasar Wright (hereinafter, "Plaintiff") as follows:

1. As to the allegations of Paragraph 1 of the Complaint, Defendants admit that this purports to be an employment discrimination action brought pursuant to the Americans with Disabilities Act (the "ADA") and which seeks remedies provided by the ADA, but deny that any employment practices of any of the Defendants give rise to a claim pursuant to that statute, further denying that this action is brought pursuant to the provisions of the ADA. Defendants further specifically deny that this is an "action arising out the employment practices" of Defendant SCSA, as Defendant SCSA is not an employer under the ADA.

2. Defendants admit that the Complaint alleges facts which, if true, would fall within the subject matter jurisdiction of this Court, but deny that the actions of the Defendants, or any of them, in fact constitute any violation of any federal law or regulation, including, but not limited, to the ADA.

3. Paragraph 3 of the Complaint is admitted upon

information and belief, although neither Plaintiff's gender, his citizenship, nor his residence are relevant herein.

4. The allegations of the first three sentences of Paragraph 4 of the Complaint are admitted. As to the allegations of the final sentence of that paragraph, Defendants show that Local 1422, in derogation of its obligations and responsibilities under the hiring hall provisions of the applicable collective bargaining agreement and Longshore Seniority Plan, referred Plaintiff to work with UNS in January 1995, but without so advising any of the Defendants. All allegations of the final sentence of paragraph 4 of the Complaint additional to or inconsistent with the foregoing are denied.

5. The allegations of the first three sentences of Paragraph 5 of the Complaint are admitted. As to the allegations of the final sentence of that paragraph, Defendants show that Local 1422, in derogation of its obligations and responsibilities under the hiring hall provisions of the applicable collective bargaining agreement and Longshore Seniority Plan, referred Plaintiff to work with Stevens in January 1995, but without so advising any of the Defendants. All allegations of the final sentence of Paragraph 5 of the Complaint additional to or inconsistent with the foregoing are denied.

6. The allegations of the first three sentences of Paragraph 6 of the Complaint are admitted. As to the allegations of the final sentence of that paragraph, Defendants show that Local 1422, in derogation of its responsibilities under the hiring hall provisions of the applicable collective bargaining agreement and Longshore Seniority Plan, referred Plaintiff to work with SSA in January 1995, but without so advising any of the Defendants. All allegations of the final sentence of Paragraph 6 of the Complaint additional to or

inconsistent with the foregoing are denied.

7. The allegations of the first three sentences of Paragraph 7 of the Complaint are admitted. As to the allegations of the final sentence of that paragraph, Defendants shows that Local 1422, in derogation of its obligations and responsibilities under the hiring hall provisions of the applicable collective bargaining agreement and Longshore Seniority Plan, referred Plaintiff to work with Ryan-Walsh in January 1995, but without so advising any of the Defendants. All allegations of the final sentence of Paragraph 7 of the Complaint additional to or inconsistent with the foregoing are denied.

8. The allegations of the first three sentences of Paragraph 8 of the Complaint are admitted, and the allegations of the final sentence of that paragraph are denied.

9. The allegations of the first three sentences of paragraph 9 of the Complaint are admitted, and the allegations of the final sentence of that paragraph are denied.

10. Defendants admit the allegations contained in the first two sentences of Paragraph 10 of the Complaint, and deny the remainder thereof.

11. Defendants admit Plaintiff was employed by the longshore industry prior to the date of the accident which gave rise to his claim under the Longshore and Harbor Workers' Compensation Act, but deny that he has been employed in the longshore industry since that date. Defendants admit the remaining allegations of paragraph 11 of the Complaint upon information and belief.

12. As to the allegations of Paragraph 12 of the Complaint, Local 1422 operates a "hiring hall" pursuant to the provisions of successive collective bargaining agreements and a Longshore Seniority Plan between Local 1422 and the SCSA. The terms of those agreements speak for themselves, and all allegations of paragraph 12 of the Complaint additional to or inconsistent with the provisions of those agreements are denied.

13. While the allegations contained in Paragraph 13 of the Complaint attempt to summarize the "typical" operation of the hiring hall operated by Local 1422, Defendants deny that longshoremen who report for work are necessarily "assigned each day to work on gangs, as requested by the stevedoring employers," and that "a longshoreman with substantial seniority will, in the course of a month, be assigned to work for each of the Defendant companies that performs stevedoring services in the Port charleston," and show that varying conditions render the general description in that paragraph inapplicable to specific circumstances so as to preclude any such description from being a factual representation applicable to this action. All allegations of paragraph 13 of the Complaint additional to or inconsistent with the foregoing are denied.

14. As to the allegations of Paragraph 14 of the Complaint, without any concession that such allegations are material hereto, Defendants show that, on or about February 18, 1992, Plaintiff sustained a fracture of his right heel while in the course of service to Defendant Steven pursuant to the referral and hiring hall provisions of the then-applicable collective bargaining agreement between SCSA and Local 1422. All allegations of Paragraph 14 of the Complaint additional to or inconsistent with the foregoing are denied.

15. As to the allegations of Paragraph 15 of the Complaint, Defendants show that a panel of physicians,

acting pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act ("LHWCA"), expressed the views that Plaintiff's injury to his foot, coupled with other then existing conditions, rendered him permanently and totally disabled from performing the duties of longshore employment, while making no conclusion regarding Plaintiff's ability to work in any other industry or occupation. All allegations of Paragraph 15 of the Complaint additional to or inconsistent with the foregoing are denied.

16. As to the allegations of Paragraph 16 of the Complaint, Defendants admit that Defendant Stevens initially contested Plaintiff's assertions that he was permanently and totally disabled, but further show that the full and complete settlement of such claims, pursuant to Section 8(i) of LHWCA, constituted an abandonment and waiver of that earlier-advanced position on the part of Defendant Stevens. All allegations of paragraph 16 of the Complaint additional to or inconsistent with the foregoing are denied.

17. As to the allegations of Paragraph 17 of the Complaint, on May 26, 1994, Plaintiff entered into a settlement of his LHWCA claim with Defendant Stevens, pursuant to Section 8(i) of LHWCA, representing a full and complete settlement which was intended to compensate Plaintiff for the full amount of his expected earnings through normal retirement. That sum, reduced to present value, was Two Hundred Forty Thousand and No One Hundredths Dollars ($240,000.00), which settlement and payment were freely and voluntarily accepted by plaintiff and were approved by the United States Department of Labor on June 10, 1994. All allegations of paragraph 17 of the Complaint additional to or inconsistent with the foregoing are denied.

18. Defendants are without information sufficient to admit or deny whether Plaintiff's physical condition improved "subsequent to July, 1994" but show that such alleged "improvement" was not brought to the attention of the Defendants nor was it supported by medical evidence, and that Plaintiff's acceptance of total disability benefits estops from him from proceeding further herein. All allegations of Paragraph 18 of the Complaint additional to or inconsistent with the foregoing are denied.

19. As to the artfully-pleaded allegations of Paragraph 19 of the Complaint, Defendants show, upon information and belief, that, at some time Plaintiff sought and, without further examination or consultation, obtained a release by Howard L. Brilliant, M.D., to return to full duty work, a copy of which is attached hereto as Exhibit "A," such release being totally inconsistent with the continued assertions of the same physician throughout the period during which Defendant Stevens was attempting to secure either a return to work or alternative gainful employment for Plaintiff. All allegations of Paragraph 19 of the Complaint additional to or inconsistent with the foregoing, particularly the characterization of Dr. Brilliant's certification as "permission to attempt to return to work," are denied.

20. Defendants are without information sufficient to admit or deny the allegations of Paragraph 20 of the Complaint.

21. As to the allegations of Paragraph 21 of the Complaint, Defendants show that Local 1422, in derogation of its obligations and responsibilities under the hiring hall provisions of the applicable collective bargaining agreement and Longshore Seniority Plan, referred Plaintiff to work with several stevedoring companies during the period from January 2 through January 11, 1995, being fully aware that Plaintiff had

accepted a full and complete settlement which was designed to compensate him for his alleged inability to perform any further longshore work until his expected retirement, but without so advising any of the Defendants. All allegations of Paragraph 21 of the Complaint additional to or inconsistent with the foregoing are denied.

22. As to the allegations of Paragraph 22 of the Complaint, Defendants show that, upon discovering that Plaintiff, without medical certification and having accepted a full and complete settlement for his alleged inability to work on the waterfront, had withheld such information and had presented himself for longshore employment, Defendants concluded that Plaintiff was ineligible for further consideration for employment, and so advised Local 1422. All allegations of Paragraph 22 of the Complaint additional to or inconsistent with the foregoing are denied.

23. As to the allegations of Paragraph 23 of the Complaint, Defendants show that the communication from Defendant Stevens to Benjamin Flowers, President of Local 1422, speaks for itself, and that a copy of this communication is attached hereto as Exhibit "B." Following receipt of this communication, Local 1422 made no further referrals of Plaintiff, apparently acquiesencing [sic] to Defendants' position that Plaintiff was estopped, by virtue of his prior representations and his acceptance of a full and complete settlement, to seek further longshore employment in the Port of Charleston.

24. The allegations of Paragraph 24 of the Complaint are denied.

25. The allegations of Paragraph 25 of the Complaint are denied.

26. Defendants are without information sufficient

to admit or deny the allegations of Paragraph 26 of the Complaint. However, by virtue of Plaintiff's prior representations to the contrary, and his acceptance of a full and complete settlement in lieu of his return to work, the allegations of Paragraph 26 of the Complaint are irrelevant.

27. The allegations of Paragraph 27 of the Complaint are denied.

28. As to the allegations of Paragraph 28 of the Complaint, Defendants show that the injuries to Plaintiff's heel were not the only injuries and/or conditions which were addressed in his claims for, and settlement of, his compensation in lieu of further longshore employment. All allegations of Paragraph 28 additional to or inconsistent with the foregoing are denied.

29. The allegations of Paragraph 29 of the Complaint are denied.

30. The allegations of Paragraph 30 of the Complaint are denied.

31. The allegations of Paragraph 31 of the Complaint are denied. Additionally, having accepted a full and complete settlement in lieu of his loss of income, fringe benefits, retirement and other benefits, Plaintiff is estopped further to proceed herein. Moreover, Defendant are informed and believe that Plaintiff need only apply for pension and welfare benefits which are available to him through a collectively-bargained health and welfare plan, and such claims are virtually certain to be granted, so that Plaintiff's failure to do so constitutes a failure to exercise reasonable efforts to mitigate his damages. Finally, Defendants are informed and believe that Plaintiff is currently receiving social security disability benefits from the Social Security Administration, the receipt of which is a further basis for denial of any relief

herein.

32. As to the allegations of Paragraph 32 of the Complaint, Defendants show that it is Plaintiff's lack of education and literacy, rather than his physical condition, which precludes him from alternative employment, and that such factors were known to and considered by him in his free and voluntary acceptance of a full and complete settlement as hereinabove described.

33. The allegations of Paragraph 33 of the Complaint is denied.

34. The allegations of Paragraph 34 of the Complaint are denied.

35. The allegations of paragraph 35 of the Complaint are denied, in that Defendants are informed and believe that the charges against SCSA, Ryan-Walsh, Strachan, and Ceres were untimely filed, and in that the date of mailing of said charges is irrelevant. Defendants further show that the Equal Employment opportunity Commission stamped "Received" on these four charges on July 26, 1995, more than 180 days following the events complained of.

36. The allegations of Paragraph 36 of the Complaint are denied.

37. The allegations of Paragraph 37 of the Complaint are denied.

38. The allegations of Paragraph 38 of the Complaint are denied.

39. Defendants allege and reallege the answers and objections contained in Paragraphs 1 through 38 above as if fully set forth herein.

40. The allegations of Paragraph 40 of the Complaint are denied.

41. The allegations of Paragraph 41 of the Complaint are denied.

42. The allegations of Paragraph 42 of the Complaint are denied.

43. The allegations of Paragraph 43 of the Complaint are denied.

44. The allegations of Paragraph 44 of the Complaint are denied.

45. The allegations of Paragraph 45 of the Complaint are denied.

46. The remainder of the Complaint consists of prayers for relief which require neither admission nor denial. However, to the extent that said prayers imply, or might lead the reader to infer, that the Defendants have violated any duty with respect to Plaintiff, have engaged in any wrongful act or omission with respect to Plaintiff, or are in any manner liable to Plaintiff, said implications and inferences are denied.

SECOND DEFENSE

This Court lacks both personal and subject matter jurisdiction over Defendant SCSA by virtue of its lack of capacity as an "employer" or "agent" as those terms are defined in the Act, in that SCSA has fewer than fifteen (15) employees, as defined in 42 U.S.C. § 12111(5)(A), and is not an "agent" within the meaning of that provision.

THIRD DEFENSE

Plaintiff has deliberately, willfully, and/or negligently failed to exhaust the adequate remedies and procedures afforded him under the collective bargaining agreement between Local 1422 and SCSA, on behalf of its constituent members, as well as the remedies provided under the Longshore Seniority Plan.

FOURTH DEFENSE

Further answering and as an affirmative defense, Defendants show that Plaintiff is not, nor has he been at any time material hereto, "substantially limited in one or more of his major life activities" so as to be "impaired" within the meaning of the ADA, in that, while Plaintiff is estopped further to proceed herein, it is his education and literacy, rather than any physical limitations, which interfere with his ability to secure other employment.

FIFTH DEFENSE

By his actions, including his acceptance of a full and complete settlement in lieu of all further longshore employment, Plaintiff is estopped from asserting his claim in this action and from proceeding further herein.

SIXTH DEFENSE

Plaintiff's claims are barred by accord and satisfaction.

SEVENTH DEFENSE

Defendants' actions with respect to Plaintiff were for reasons other than his alleged disability, thereby constituting a complete defense pursuant to 42 U.S.C. § 2000e-5(g)(2)(A), as made applicable to the ADA by 42 U.S.C. § 12117(a).

EIGHTH DEFENSE

Plaintiff, having applied for and having continued to receive social security disability benefits, is estopped from asserting his claim in this action and from proceeding further herein.

NINTH DEFENSE

By his actions and prior representations, Plaintiffs has waived his ability to claim that he is able to perform the essential functions of the positions he now alleges he is able to perform.

TENTH DEFENSE

Plaintiff has not sought, nor is he entitled to, any "reasonable accommodation" as that term is defined in the ADA.

ELEVENTH DEFENSE

Local 1422 has repeatedly stated that there is no such thing as "light duty" work in any employment covered by the collective bargaining agreement between Local 1422 and SCSA. Consequently, Plaintiff's own collective bargaining representative contends that any attempt at reasonable accommodation by an employer member of SCSA would be unavailing because it would constitute the recognition of a "myth" with which Local 1422 will not agree.

TWELFTH DEFENSE

Plaintiff's charges against SCSA, Ryan-Walsh, Strachan and Ceres were untimely filed, and there is no basis in law or in fact sufficient to provide an excuse for Plaintiff's failure to comply with the jurisdictional prerequisites of 42 U.S.C. § 2000e-5(1), as made applicable to the ADA in 42 U.S.C. § 12116(a).

THIRTEENTH DEFENSE

Plaintiff's assertion of claims herein constitutes a fraud on the court, in that Plaintiff is attempting to secure a double recovery in derogation of a settlement fully and voluntarily agreed to and accepted by him.

FOURTEENTH DEFENSE

Plaintiff has unreasonably failed to mitigate his damages as required by law.

FIFTEENTH DEFENSE

Defendant UNS has not been served with the Summons and Complaint.

WHEREFORE, having fully answered, Defendants pray that the Complaint be dismissed with prejudice and denied, and that Defendants receive their costs and reasonable attorneys' fees herein.

EXHIBIT
A

WEST ASHLEY ORTHOPAEDIC CLINIC, P.A.
HOWARD L. BRILLIANT, M.D.
1249 SAVANNAH HIGHWAY
CHARLESTON, SOUTH CAROLINA 23407
TELEPHONE 571-5152

DISABILITY CERTIFICATE

Date 1-3-95

TO WHOM IT MAY CONCERN

I hereby certify that Ceasar Wright

Has been under my professional care and was:

Totally Incapacitated
Partially Incapacitated

From 2-18-92 To: 1-2-95
Remarks: May return to work on 1-2-95
full duty

Signed: H.L. Brilliant, M.D. [signature stamp]

S/H.L. Brilliant

EXHIBIT
B

STEVENS SHIPPING & TERMINAL COMPANY
STEAMSHIP AGENTS, CHARTERING BROKERS,
STEVEDORES, TERMINAL OPERATORS
1071 Morrison Drive
P.O. Drawer 1297
Charleston, SC 29402

January 11, 1995

International Longshoremen's Association
Local 1422
910 Morrison Drive
Charleston, SC 29403

Attn: Mr. Ben Flowers

Re: Caesar Wright - SSN 248-72-3878

Dear Ben,

It has come to our attention that Caesar Wright has returned to work although he was certified as permanently and totally disabled.

Both paragraph 13(D)(6) and paragraph 13(B)(1) permit the employers to determine whether an employee is "qualified" to perform job assignment. Once an individual is certified as permanently and totally disabled, he is no longer qualified to perform longshore work of any kind.

Accordingly, Mr. Wright is not eligible to be employed by this company.

Sincerely,
STEVENS SHIPPING & TERMINAL CO.
S/
W. J. Bean III
Stevedore Manager

EXCERPTS FROM COLLECTIVE BARGAINING AGREEMENT

LONGSHOREMEN'S AGREEMENT BETWEEN THE SOUTH CAROLINA STEVEDORES ASSOCIATION AND THE INTERNATIONAL LONGSHOREMEN'S ASSOCIATION LOCAL #1422

1. This agreement was made and entered into on the 30th day of November, 1990 between the South Carolina Stevedores Association and its direct employer members, hereinafter known as the party of the first part and the South Atlantic & Gulf Coast District of the International Longshoremen's Association representing its subordinate Local No. 1422, hereinafter known as the party of the second part.

* * *

13.(A)(1) Longshore work is to cover all labor used in connection with loading or discharging ships, barges or other floating craft. It will include men engaged in handling cargo to or from point of rest or to or from cars or trucks when handled direct to or from ships. It will include all operators of mechanical equipment used in such operations, including cranes owned by Stevedore Contractors when qualified operators are available, provided, however, that this shall not require the Employers to alter any existing practices. When a Stevedore Contractor introduces new mechanical equipment he must endeavor to train men presently in the industry to operate such equipment. It will also cover sorting, coopering or reconditioning of cargo when performed in connection with stevedoring work; the handling of ships' stores when not carried by hand up the gangway; the handling of baggage to and from ships' deck of passenger vessels, all mail, dunnaging (excluding bulk separations), rigging (excluding rigging for heavy lifts) and the following operations when vessel is alongside dock; cleaning of cargo areas aboard ship, lashing and securing cargo and the fitting and dismantling of fittings. It will also include gearmen (not mechanics) when assigned to ships; the operation of permanently mounted shipboard cranes and winches, and the handling of lines when performed by stevedores. It also includes opening and closing of hatches on conventional-type vessels with tween decks when working general cargo.

* * *

13.(B)(1) The Employer shall give due regard to the following factors:

1. Protecting the safety and health of all men employed in the operation.
2. Regulating stevedoring operations to best accomplish the safe, efficient and orderly movement of cargo.
3. Utilizing modern methods and equipment in the interest of avoiding unnecessary manual labor. Where this is implemented with the result that there will be a change in the operations the Employer will discuss his intentions in advance with the Union to enable both parties to agree on the most efficient operation.
4. Making the best use of skilled manpower in the light of the above consideration.

It is distinctly understood and agreed that the Union has the privilege of bringing to the attention of each Employer any practices which the Union feels are not in accord with the spirit of the foregoing. The Employers hereby agree to promptly investigate and give careful consideration to all suggestions and recommendations from the Union in the light of the objectives set forth above. If such procedure still fails to satisfactorily dispose of any such questions, they shall be resolved through the arbitration procedure set forth in Clause 15.

* * *

13.(D)(5) Where hardship is claimed by Union and/or Management because of unreasonable or burdensome conditions or where work methods or operations materially change in the future, the problem shall first be discussed between the Local and Management involved. In the event an agreement cannot be reached, either party may refer the dispute to the Joint Negotiating Committee and if the matter cannot be resolved by that Committee, either party may then refer the question to an arbitrator in accordance with the procedure set forth in Clause 15(B).

13.(D)(6) There shall be no interference with the Employer's right to shift men from hatch to hatch, ship to ship, dock to ship or ship to dock so long as the number of men shifted from any gang does not reduce the Gang structure below the minimum required as determined by the class of cargo being handled by the gang. In no event shall men be shifted from any gang for the purpose of opening, closing and rigging a hatch to which the entire gang has not been assigned.

The Employer also reserves the right to hire and discharge. It is recognized that the Employer has the right to utilize men in any combination of job classification for which they are qualified, providing that they receive the pay rate of the highest job classification in which they are employed during their work shift.

13.(E) Neither party shall uphold incompetency, shirking of work, insubordination or the use of abusive language and personnel guilty of these offenses shall be dealt with as circumstances require. Persons guilty of misconduct offenses shall be dealt with as follows:

1. PILFERAGE

The I.L.A. Locals parties hereto agree to make every effort to prevent pilferage or broaching of cargo, and any person found guilty of such broaching, or pilfering or knowingly having broached or pilfered cargo in his possession, shall be disciplined as follows:

PENALTIES:

First Offense - Sixty (60) days suspension from work through any and all I.L.A. Hiring Halls covered under this Agreement.

Second Offense - Ninety (90) days suspension from work through any and all I.L.A. Hiring Halls covered under this Agreement.

Third Offense - Permanent suspension from work through any and all I.L.A. Hiring Halls covered under this Agreement.

2. VIOLENCE

(A) Display or Possession of Weapons

When anyone employed under the terms of this Agreement, or in the exercise of any official capacity under the terms of this Agreement, is found guilty of displaying or knowingly possessing a dangerous weapon at any facility normally considered a work place under this Agreement, the following penalties shall apply:

First Offense - Sixty (60) days suspension from employment through any and all I.L.A. Hiring Halls and from acting in such official capacity under the terms of this Agreement.

Second Offense - Ninety (90) days suspension from employment through any and all I.L.A. Hiring Halls and from acting in such official capacity under the terms of this Agreement.

Third Offense - Permanent suspension from employment through any and all I.L.A. Hiring Halls and from acting in such official capacity under the terms of this Agreement.

(B) Physical Assault With a Dangerous Weapon

Anyone employed under the terms of this Agreement, or in the exercise of any official capacity under the terms of this Agreement found guilty of deliberately physically assaulting another individual with a dangerous weapon at any facility normally considered a work place under this Agreement, shall be immediately and permanently suspended from employment through any and all I.L.A. Hiring Halls and such official capacity covered under the terms of this Agreement.

(C) Battery

"Battery" - When anyone employed under the terms of this Agreement or in the exercise of any official capacity under the terms of this Agreement is found guilty of beating or using physical violence on a person, without that person's consent, the following penalties shall apply:

First Offense - Sixty (60) days suspension from employment through any and all I.L.A. Hiring Halls and from acting in such official capacity under the terms of this Agreement.

Second Offense - Ninety (90) days suspension from employment through any and all I.L.A. Hiring

Halls and from acting in such official capacity under the terms of this Agreement.

Third Offense - Permanent suspension from employment through any and all I.L.A. Hiring Halls and from acting in such official capacity under the terms of this Agreement.

Offenses which occurred more than three (3) years prior to the date of an offense, shall not be considered in determining the appropriate misconduct penalty for the latest offense.

3. INTOXICATION

When anyone employed under the terms of this Agreement or in the exercise of any official capacity under the terms of this Agreement is found guilty of being intoxicated at any facility normally considered a work place or bringing intoxicants on the premises at any facility normally considered a work place under this Agreement, the following penalties shall apply:

First Offense - Sixty (60) days suspension from employment through any and all I.L.A. Hiring Halls and from acting in such official capacity under the terms of this Agreement.

Second Offense - Ninety (90) days suspension from employment through any and all I.L.A. Hiring Halls and from acting in such official capacity under the terms of this Agreement.

Third Offense - Permanent suspension from employment through any and all I.L.A. Hiring Halls and from acting in such official capacity under the terms of this Agreement.

Offenses which occurred more than three (3) years prior to the date of an offense, shall not be considered in

determining the appropriate misconduct penalty for the latest offense.

4. POLICY ON DRUGS (SEE APPENDED POLICY ON DRUGS)

5. ENFORCEMENT

An individual shall be subject to the penalties provided herein when found guilty of any misconduct charges listed above when his guilt is established by a forum properly constituted under Union By-Laws and/or Hiring Hall procedures, by a committee or arbitrator as provided under the grievance and arbitration procedures of this Agreement, or by a court of law or a governmental agency of competent jurisdiction.

Personnel suspended as a result of misconduct shall lose seniority and G.A.I. eligibility and benefits for the period of the suspension. Should any of the misconduct offenses occur in the Hiring Hall areas, it shall carry the same penalty as occurring at the work sites, and a committee of duly appointed or elected persons who work under the terms and conditions of this Collective Bargaining Agreement shall judge the guilt or innocence of persons charged with misconduct in the Hiring Hall area.

* * *

15.(A)(1) During the term of this Agreement, the Employer agrees that there shall be no lockouts of the members of the Union and the Union agrees there shall not be any strike of any kind or degree whatsoever, walkout, suspension of work, curtailment or limitation of production, slowdown, or any other interference or stoppage, total or partial, of the Employer's operation for any causes whatsoever; such causes including but not limited to unfair labor practices by the Employer or violation of this Agreement. The right of employees not to cross a bona fide picket line is recognized by the Employer. The Union shall not be financially responsible for strikes or walkouts not authorized or assented to by the Union.

15.(A)(2) If the Administrator of any fund established under the terms of this Agreement determines that an Employer is delinquent in paying the requisite assessments, contributions, royalties or other required payments to the fund when due, he shall immediately notify the union party hereto with copy to the delinquent Employer. If within 7 days the Employer does not either convince the Administrator he is in fact not delinquent or pay the delinquent account, the Union will be released from its obligations under Clause 15(A)(1) to continue to work for that Employer and shall not dispatch personnel to that Employer until the delinquency is ended. The Employer shall be liable not only for the amount of the delinquency, but for attorney fees, auditing fees, court costs and all other related collection expenses. In the event of disagreement as to the applications of the above, the dispute shall be settled as a grievance under the procedure of Clause 15(B), but omitting the Port Grievance Committee and being referred directly to the District Grievance Committee.

15.(B) Matters under dispute which cannot be promptly settled between the Local and an individual Employer shall, no later than 48 hours after such discussion, be referred in writing covering the entire grievance to a Port Grievance Committee composed of one member from a company not involved in the dispute, the Port Employer member of the Joint Negotiating Committee, an the Port Union member of the Joint Negotiating Committee, and a Union member not involved in the previous attempts to settle the dispute. In the event this Port Grievance Committee cannot reach an agreement within five days after receipt of the complaint, the written record of the dispute shall be referred to the Joint Negotiating Committee, which will function as a District Grievance Committee on the following basis:

There must be present at the Grievance Committee Meeting at least three (3) regular Employer members and three (3) regular Union members, in addition to the members from the port originating the dispute, as these latter members may participate in the discussion but may not vote. Each side shall have four votes, and if the fifth member of either side is absent he shall authorize his vote to be cast by one of the voting members in attendance. This Grievance Committee shall meet at least quarterly, and in the case of urgent matters it shall made every effort to meet as soon as possible.

A majority decision of this committee shall be final and binding on both parties and on all employers signing this Agreement. In the even the Committee is unable to reach a majority decision within 72 hours after meeting to discuss the case, it shall employ a professional arbitrator whose expense and fees, as well as those of any expert witnesses required by the arbitrator are to be borne jointly by the Management and the Union of the port concerned. Should the Committee be unable to agree on the selection of an arbitrator, they shall request the assistance of the Federal Mediation and Conciliation Service in designating a suitable arbitrator. Expenses of the Employer members of the District Grievance Committee are to be borne by the Port Employers, and of the Union Members of the district Grievance Committee by the I.L.A.

In the selection of an arbitrator, thought will be given to a person who is knowledgeable and familiar with the problems of the Longshore industry.

Any decision in favor of the employee involving monetary aspects or discharge shall require the employer involved to make financial restitution from the time of the complaint concerned, whereas decisions involving working methods or interpretations shall take effect seventy-two hours after being rendered.

15.(C) The above mentioned Joint Negotiating Committee shall consist of an Employer's side of five members, one each from Wilmington, North Carolina; Charleston, South Carolina; Savannah, Georgia; Jacksonville, Florida; Tampa, Florida; and a Union side of the I.L.A. representative from each of these ports.

Each Employer vacancy shall be filled by the port with the vacancy, and each Union vacancy by the Southeastern Dock and Marine Council of the of the I.L.A.

15.(D) The Joint Negotiating Committee upon written requests of any Employer signatory to this Agreement or any Local covered by this Agreement shall determine whether new commodities or new types of packing present hazards or discomfort in handling which make it necessary to add such items to now-existing penalty classifications. Such decisions shall be final and binding on all signatories to this Agreement, but where no majority decision is reached by the Committee, this shall constitute a denial of such addition.

15.(E) It is understood and agreed that there will be no changes made in this Agreement except by mutual consent in writing and with the full knowledge of all members of the Joint Negotiating Committee. All interpretations of this Agreement will be made in accordance with the provisions of Clause 15.

15.(F) The Union agrees that this Agreement is intended to cover all matters affecting wages, hours, and

other terms and conditions of employment and that during the term of this Agreement the Employers will not be required to negotiate on any further matters affecting these or other subjects not specifically set forth in this Agreement. Anything not contained in this Agreement shall not be construed as being part of this Agreement. All past port practices being observed may be reduced to writing in each port.

16. Both parties agree to cooperate with all efforts to provide safe working conditions including such efforts of the United States Department of Labor and of all Portwide Longshore Safety Councils and company safety programs. Where neither such Councils nor such company programs now exist, the parties shall cooperate in establishing one or the other, with meetings to take place at least quarterly.

The requirements of the Occupations [sic] Safety and Health Administration shall be binding on both Parties. All personnel reporting for work must be dressed so that no additional hazard is created and must wear safety shoes and hard hats.

It shall be mandatory that each port have a viable, actively working safety program. These programs will be administered by a Joint Committee of Management and Labor in each port and shall utilize the following general work rules; and also encompass safety and health matters arising under various statutes, including the Occupational Safety and Health Act.

GENERAL SAFETY RULES

The following general safety work rules shall be used as guide lines to set up each port safety program.

GENERAL CARGO

* * *

6. No worker shall be allowed to shape up or remain on the job if under the influence of drugs or alcohol or is not physically qualified to safely perform all work to which he is assigned.

7. A known epileptic will not be referred to work unless he obtains a physician's written certification on a periodic basis stating that he is receiving medication to control or stabilize his condition; that he has not had a seizure during the period the medication has been administered; that he will not, in all medical probability, be susceptible to epileptic seizures while on medication; and that his epileptic condition will not otherwise impair his ability to perform the tasks required of him.

* * *

17. It is the intention and purpose of all parties hereto that no provision or part of this Agreement shall be violative of any Federal or State Law.

* * *

For the International	For the South Carolina
Longshoremen's Association	Stevedores Association
S/	S/
Benjamin Flowers President, ILA Local 1422	James P. Lamb Employer Representative

CHARLESTON LONGSHORE SENIORITY PLAN

To implement the employment of Longshoremen in the Port of Charleston, South Carolina, under a seniority system as required by the present Collective

Bargaining Agreement of I.L.A. Local 1422, the parties thereto hereby agree to the following:

1. The operation of the plan shall be governed by a Seniority Board composed of the President of I.L.A. Local 1422 and one representative appointed by the Membership of I.L.A. Local 1422, the Charleston Employers' Representative of the District Negotiating Committee and one representative chosen by the Employers who are party to the Charleston Longshore Agreement. Each member of the Board shall designate an alternate to serve in his absence.

2. Any dispute concerning or arising out of the terms and/or conditions of this Agreement, or dispute involving the interpretation or application of this Agreement, or dispute arising out of any rule adopted for its implementation, shall be referred to the Seniority Board.

a) The Seniority Board shall act by a majority vote, and should they reach determination in a particular dispute such determination shall be final and binding.

b) The Board shall hold meetings on the second Wednesday of each month unless there is no scheduled business. Special meetings may be held when necessary.

c) If the Seniority board shall be unable to reach a determination of a particular dispute, the dispute shall be submitted to a Committee of two for final determination. This Committee shall be composed of one individual chosen by I.L.A. Local 1422 and one individual chosen by the South Carolina Stevedores Association. The individuals chosen must be from outside the Charleston area and be active in the longshore industry in the South Atlantic or Gulf area.

d) The Seniority Board shall be a permanent body, and shall have sessions within one week after a dispute or grievance arises.

e) The Seniority Board shall be the sole judge of the sufficiency of the evidence to be considered and the resolution of any dispute brought before it.

f) Any dispute or grievance brought by an individual employee must be submitted to the Board in writing at least forty-eight hours in advance and the complaint must be signed by the grievant.

g) The Board shall have authority to determine whether any of the rules listed herein have been violated and shall have power to evoke the penalties as provided under Paragraph Eight herein.

STATEMENT OF MATERIAL FACTS NOT IN DISPUTE

1. Plaintiff, who was born on July 16, 1942, worked from 1970 through 1992 as a longshoreman in the Port of Charleston, South Carolina.

2. Plaintiff, while working for Defendant Shipping and Terminal Company on February 18, 1992, sustained a serious injury to his right heel, and an injury to his back. He did not work again until January 2, 1995.

3. Pursuant to the Longshore and Harbor Workers Compensation Act, 33 U.S.C. § 901 *et seq.*, Plaintiff pursued a claim for disability compensation. Defendant Stevens Shipping paid Temporary Total Disability benefits to Plaintiff until the end of September, 1993. At that time, relying on an opinion of Dr. Robert Lowery that Plaintiff could return to certain work as a longshoreman (driver transport, RORO; Tab 11 at 113), Defendant Stevens Shipping discontinued all disability compensation benefits to Plaintiff.

4. In April, 1994, Plaintiff was using a cane "most of the time," including when he attended exams by his treating physician, Dr. Howard L. Brilliant. Plaintiff testified that his right foot swelled if he stood "constantly for maybe an hour or two." (Tab 28 at 983 [p. 39]).

5. Plaintiff's compensation claim was set for hearing in May, 1994. Dr. Robert Lowery and a vocational consultant for Stevens Shipping believed that Plaintiff could return to longshore work, or to less demanding work as a cashier or counter clerk (Tab 8 at 102-8; Tab 11 at 112-13).

6. Dr. Brilliant did not believe that Plaintiff was able to perform any of the jobs that Dr. Lowery had approved for Plaintiff. Timothy Bryson, a vocational

consultant retained by Plaintiff's compensation attorney, did not believe that Plaintiff was capable of performing any of the jobs approved by Dr. Lowery (Tab 14 at 145), or any other competitive employment.

7. Plaintiff testified on April 28, 1994, that he would like to return to work as a longshoreman, but that his union would not refer him for work until his medical condition improved. (Lorberbaum Declaration at ¶4.)

8. Plaintiff had potential claims both for permanent total disability, if he were unable to return to any competitive gainful employment, and for permanent partial disability if his back injury combined with his foot injury to reduce his earning capacity. (Lorberbaum Declaration at ¶8)

9. If Plaintiff had been found to be totally and permanently disabled, his compensation benefit would have been $3,033.16 per month, based on the weekly compensation rate of $699.96. Plaintiff had an Average Weekly Wage preceding the accident of $1,591.05. If he had been found entitled to permanent partial disability, he could have earned up to $540 per week (more than $28,000 per year) and still have been awarded the same monthly compensation of $3,033.16, for permanent *partial* disability. Two of the three non-longshore jobs identified by the vocational consultant for Stevens Shipping were minimum wage jobs (Tab 8 at 107-8); none of the non-longshore jobs would have paid $20,000 per year.

10. Under the Longshore and Harbor Workers Compensation Act, Plaintiff could have collected periodic disability benefits, up to $3,033.16 per month, until his death. According to the stipulation to settle the compensation claim, Plaintiff's life expectancy was an additional thirty-three years, or 396 months (Tab 17 at 207).

11. Defendant Stevens Shipping decided to compromise Plaintiff's claim by paying to Plaintiff a total of $250,000, of which $123,604.96 was allocated, by agreement of the parties, to future indemnity as monthly disability benefits of $312.13, beginning October 1, 1994. (Tab 17 at 205-7; Lorberbaum Declaration at ¶¶7-8.) Attorney Lorberbaum's undisputed declaration states, "The future indemnity constituted a very modest settlement for Mr. Wright's claim for benefits for permanent partial disability, 33 U.S.C. §908(c)(21)."

12. No judicial finding or stipulation was made that Mr. Wright was permanently totally disabled. No judicial finding or stipulation was made that Mr. Wright would never be able to return to his prior work as a longshoreman. (See Decision and Order, Tab 18.) None of the settlement documents or discussions suggested that Plaintiff would be barred from returning to work for Defendant Stevens Shipping, or any other longshore employer. (Lorberbaum Declaration; Plaintiff's Declaration) In a recent Release for a workers compensation settlement of another employee, Defendant Stevens Shipping included a specific waiver of right to re-employment. (Declaration of James Brown and attachment.) No employer other than Stevens Shipping participated in Plaintiff's claim or Plaintiff's Settlement.

13. The settlement of the compensation claim stipulated that Temporary Total Disability benefits would be paid to Plaintiff through the end of September, 1994. Technically, Temporary Total Disability benefits are not to be paid after the employee reaches Maximum Medical Improvement.

14. During his convalescence, Mr. Wright also applied for Social Security Disability benefits, which were awarded by letter dated July 18, 1993 (Tab 24). To qualify for these benefits he was required to be disabled

for a period of at least twelve consecutive months; the Social Security Act and regulations do not require that a worker be permanently disabled in order to qualify for monthly disability benefits. Plaintiff continued to receive monthly disability benefits from Social Security throughout 1994.

15. After receiving his settlement in June, 1994, Plaintiff installed a whirlpool tub in his home to help his chronic back pain, and he began an exercise program at Lifequest, a health club, to strengthen his right leg. (Plaintiff's Declaration) He became able to walk without a cane, and was able to stand and walk for longer periods of time. His back pain resolved.

16. Dr. Brilliant, Plaintiff's treating physician, does not believe the exercise relieved the pain and swelling in Plaintiff's right foot. However, on January 24, 1995, Dr. Brilliant observed that a bony spike, which had been protruding from Plaintiff's ankle bone after the injury, had substantially "resorbed" into the ankle, which lessened Plaintiff's pain. (Brilliant dep. at 99, 113; Tab 34 at next to last page.) This resorption was not predictable, but it was not an unusual occurrence.

17. On January 2, 1995, Plaintiff returned to work as a longshoreman. He obtained a written release from his treating physician, Dr. Brilliant, that he could return to work without restrictions. Dr. Brilliant testified that, by this release, he intended to indicate that working without restrictions would not be medically harmful to Plaintiff. (Brilliant dep. at 89-90) At his deposition, Dr. Brilliant testified that Plaintiff could perform, without risk of injury to himself, the duties of all the jobs described in position descriptions prepared for Defendant Stevens Shipping (dep. at 101-10).

18. Plaintiff worked through January 11, 1995, as

follows (Tab 36 at 17-8, and pay stubs):

Date Worked	**Employer**	**Position**	**Hours**
01/02/95	Universal	Header	9.0
01/03/95	Ceres	Lasher	12.0
01/05/95	Universal	Header	10.0
01/06/95	Universal	Header	8.5
01/08/95	Universal	Header	9.0
01/09/95	Ryan-Walsh		9.5
01/10/95	Ceres	Hatchtender	10.5
01/11/95	Strachan	Holdman	9.0
Total hours			**77.5**

Plaintiff's Declaration reflects that he tolerated the required duties well and that he received no criticism or complaints during his employment. In response to Requests for Production (#14), defendants produced no documented criticisms of Plaintiff's work during this period of work.

19. Dr. Brilliant testified that Plaintiff still suffers a significant deformity in his right foot. By physical examination alone, Dr. Brilliant could not determine whether Plaintiff could tolerate longshore work on a regular basis. He recommended that Plaintiff do longshore work for a month, as an appropriate trial (dep. at 115).

20. The Social Security Act and regulations authorize a "trial work period" for up to nine months, while disability benefits are continued. Plaintiff reported his earnings from the period of his employment, January 2-11, 1995, to Social Security (Tab 25). Social Security acknowledged the report, and indicated that Plaintiff's claim would be reviewed from time to time to determine his continued eligibility (Tab 26).

21. The Collective Bargaining Agreement in this case does not make explicit reference to the Americans with Disabilities Act, nor to any other statute precluding discrimination in employment. Plaintiff is not a party to the Collective Bargaining Agreement.

22. When Plaintiff was denied employment by the defendants, his union officials did not recommend that he file a grievance; they recommended that he retain a private attorney. (Plaintiff's Declaration) He did so by January 26, 1995. (*Idem.*)

23. Defendants contend that, within 48 hours after Plaintiff learned that he was being refused employment, which was by January 12, 1995, he was required to grieve the refusal under the Collective Bargaining Agreement, and that his failure to file a grievance in that time bars all statutory claims of employment discrimination, including his claims under the Americans with Disabilities Act. (Tab 33) When Plaintiff served notice of his administrative charges of discrimination, none of the defendants demanded, requested, or suggested that the dispute should be grieved or arbitrated.

24. South Carolina is recognized by the Equal Employment Opportunity Commission as a state in which state statutes provide a remedy for discrimination against handicapped individuals or individuals with a disability, within the meaning of 42 U.S.C. § 2000e - 5(e).

25. Administrative charges fully stating all elements of a claim of discrimination on the basis of disability or perceived disability, executed under oath and under penalties of perjury by Plaintiff against all defendants, were received by facsimile transmission by the EEOC on July 7, 1995, and earlier as to three defendants. (Tab 37 at 621-22, 645-46, 610-11; Ray Declaration and attachments)

MOTION TO COMPEL ARBITRATION WITH SUPPORTING AUTHORITIES (AND JOIN ADDITIONAL PARTY)

Now comes Plaintiff above-named, by his undersigned counsel, and respectfully requests that this Honorable Court enter an Order compelling Defendants to submit to arbitration of the grievances attached here to, including claims under the Americans with Disabilities Act, relating to the employment of Plaintiff Ceasar Wright by any of the Defendants herein; and, if necessary or appropriate, to enter an Order pursuant to Rules 19, 20 and 21, FRCP, joining the International Longshoremen's Association and Local 1422, International Longshoremen's Association, as parties to this action for the purpose of addressing the issue of arbitration under the Collective Bargaining Agreement.

As GROUNDS for the foregoing relief, Plaintiff would show the following:

Policy Considerations Supporting the Motion

1. Plaintiff's primary objective is to have his statutory claims of discrimination heard on the merits. Defendants' primary objective appears to be to prevent the claims from being heard on the merits. Equity, justice, and the policies of federal law strongly support plaintiff's objective.

2. As this Court has construed the decision in *Austin v. Owens-Brockway*, 78 F.3d 875 (4th Cir.), *cert. den.*, 65 U.S.L.W. 3351, 3353 (Nov. 12, 1996), plaintiff must submit his statutory claims of discrimination to the arbitral forum. However, as pointed out in Plaintiff's Motion for Reconsideration, Defendants now refuse to allow the arbitral forum to address the merits.

3. The inequities of Defendants' position are

clear. As Judge Hall pointed out in his dissent in *Austin*, the Supreme Court's decisions prior to January 15, 1995, gave no hint that Plaintiff would be required to submit his statutory claims of discrimination to the union's arbitral forum. Plaintiff timely preserved all his statutory rights under the procedures recognized at the time.

4. If the new rule of the *Austin* decision is to be applied to Plaintiffs claim, the very least this Court should do, as a matter of equity, is to apply tolling doctrines to preserve the claims from being time-barred, and direct that the claims now be heard on the merits in the arbitral forum.

Addition of Union as a Party

5. Counsel for Defendants has advised of his position that such relief cannot be granted without the union being a party. The Court has the authority to add the union (the International and the Local Union, if appropriate) as party to this action, if the union is either a necessary party (Rule 19, FRCP[)], or an appropriate party (Rule 20, FRCP)). The party, under Rule 21, FRCP, can be added "at any stage" of the litigation, even on appeal. *Reed v. Robillo*, 376 F.2d 392 (6th Cir. 1967); 7 Wright & Miller, Federal Practice & Procedure: Civil, §1688 (1972).

Facts Shown in Exhibits Relating to Arbitration

6. Plaintiff worked for several defendants in the period January 2 - 11, 1995. Thereafter, defendants agreed to refuse to accept Plaintiff['s] services.

7. Plaintiffs union, Local 1422, International Longshoreman's Association, filed a timely grievance of the denial of employment. See Exhibits 2, 3, 4, January 12, 1995. However, when this grievance was not resolved, the union recommended that Plaintiff pursue his statutory

remedies under the Americans with Disabilities Act (ADA) rather than immediately arbitrating the grievance.

8. On or about April 19, 1996, Plaintiffs counsel offered to submit the ADA claims to arbitration, providing the union consented, reserving the parties' respective positions as to the effect of such arbitration. See Exhibit 7.

9. Defendants, through counsel, declined to submit the ADA claims to arbitration. See Record, Tab 33, dated April 22, 1996 (Exhibit 8). Defendants take the position that the period for demanding arbitration was not tolled by timely filing of administrative charges and this suit.

10. On or about July 8, 1996, Plaintiff again presented himself for work at defendants Stevens Shipping Company and Universal Maritime, respectively. Plaintiffs services were again rejected.

11. Plaintiff then filed a timely grievance dated July 9, 1996. See Exhibit 9.

12. Defendants Stevens and Universal have refused to address the grievance on the merits, as set forth in their response, dated July 12, 1996, to the initial grievance. (Exhibit 10.)

13. Plaintiffs union, Local 1422, then demanded further grievance proceedings, by letter dated July 22, 1996. See Exhibit 11. Plaintiff is informed and believes that no further proceedings have taken place.

14. Plaintiffs counsel promptly sought copies of the documents relating to the latest attempt to grieve Plaintiffs claims, in order to present the matter to the Court. See Exhibit 12, letter dated July 29, 1996. However, no response was received until on or about November 25, 1996. (See letter from Benjamin Flowers,

dated November 21, 1996, Exhibit 14).

Conclusion

15. The Fourth Circuit's decision in *Austin* constitutes a major change in the "rules of the game" for enforcing the statutory rights of employees who work under union collective bargaining agreements. There are numerous policy questions that the Courts will eventually have to resolve, if *Austin* is extended, as this Court has indicated it should be, to all collective bargaining agreements (not just those agreements, like *Austin*, that adopt the statutory obligations of non-discrimination as contractual obligations). For example, since unions control access to arbitration, the focus of non-discrimination litigation could be directed to hundreds or thousands of "duty of fair representation" cases, bringing both unions and employers before the federal courts, with the major financial responsibility for unlawful discrimination falling not on the bad actor (the employer) but on the union for failing to enforce statutory rights. See, e.g., *Bowen v. U.S. Postal Service*, 459 U.S. 212 (1983). It is easy to see why defendants assert such a rule, but it is questionable whether DFR cases are the best means to enforce national policies against discrimination in employment.

16. Given the radical change in the "rules of the game" reflected in *Austin*, the Court, in equity and good conscience, should apply principles of equitable tolling and require the defendants to submit to arbitration the merits of Plaintiff's statutory claims of discrimination.

(10)

No. 97-889

Supreme Court, U.S.
FILED
MAY 7 1998

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

CEASAR WRIGHT,
Petitioner,
v.
UNIVERSAL MARITIME SERVICE CORP., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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61pp

QUESTION PRESENTED

Was the court below correct in holding -- contrary to this Court's decisions in *Alexander v. Gardner-Denver Co.* and other cases, particularly *Barrentine v. Arkansas-Best Freight Co.*, and *McDonald v. City of West Branch*, -- that a general arbitration clause in a collective bargaining contract bars an employee covered by the contract from filing his own lawsuit under a federal anti-discrimination statute?

PARTIES TO THE PROCEEDINGS

The parties are Ceasar Wright, Petitioner, and Universal Maritime Service Corp., Stevens Shipping & Terminal Company, Stevedoring Services of America, Ryan-Walsh, Inc., Strachan Shipping Company, Ceres Marine Terminals, Inc., and South Carolina Stevedores Association, Respondents. None of the corporate Respondents is a publicly held corporation or a subsidiary of a publicly held corporation, according to disclosures filed by Counsel for Respondents in the court below.

TABLE OF CONTENTS

Page

Question Presented i

Parties to the Proceedings ii

Table of Contents iii

Table of Authorities iv

Opinions Below 1

Jurisdiction 2

Statutory Provisions Involved 2

Statement of the Case 2

Summary of Argument 10

Argument 13

I. By statute, tradition, function, and intention, "grievances" under a labor agreement, including the agreement here, are limited to disputes about the application of the collective bargaining agreement 17

II. Because the collective bargaining process is designed to be controlled by the majority, the rights of victims of discrimination cannot be waived by a bargaining representative, and the union here did not intend to waive those rights 22

III. This bargaining agreement, like most labor agreements, does not provide a mechanism for adequately vindicating rights under employment discrimination statutes 30

IV. No statute creates a national policy that a collective bargaining agreement should supersede the judicial remedies Congress provided to enforce the Americans with Disabilities Act and other statutes prohibiting employment discrimination 39

Conclusion 48

TABLE OF AUTHORITIES

Page

CASES:

Adarand Constructors, Inc. v. Pena,
515 U.S. 200 (1995) 47

Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) 16

Alexander v. Gardner-Denver Co.,
415 U.S. 36 (1974) .... passim

Atchison, T. & S.F.R. Co. v. Buell,
480 U.S. 557 (1987) 18, 46

Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875 (4th Cir.), *cert. denied*,
___ U.S. ___, 117 S.Ct. 432 (1996) .... passim

Baltimore Regional Joint Board v. Welaster Clothes, 596 F.2d 95 (4th Cir. 1979) 34

Barrentine v. Arkansas-Best Freight System,
450 U.S. 728 (1981) .... passim

Bowen v. U.S. Postal Service, 459 U.S. 212 (1983) 37

Boys Markets v. Retail Clerks Union,
398 U.S. 235 (1970) 23

Brisentine v. Stone & Webster Engineering Corp.,
117 F.3d 519 (11th Cir. 1997) 18n, 29

Cole v. Burns Intern. Security Services,
105 F.3d 1465 (D.C. Cir. 1997) 32, 44

Curtis v. Loether, 415 U.S. 189 (1974) 34

Domino Sugar Corp. v. Sugar Workers Local Union 392,
10 F.3d 1064 (4th Cir. 1993) 43n

Electrical Workers v. Foust, 442 U.S. 42 (1979) 34

Electrical Workers v. Robbins & Myers, Inc.,
429 U.S. 229 (1976) 18n, 35

Gilmer v. Interstate/Johnson Lane Corp.,
500 U.S. 20 (1991) .... passim

Goodman v. Lukens Steel, 482 U.S. 656 (1987) 24, 26, 27

Graham Oil Co. v. ARCO Products,
43 F.3d 1244 (9th Cir. 1995) 32

Harrison v. Eddy Potash, Inc., 112 F.3d 1437
(10th Cir.), *pet. for cert. filed*, 66 U.S.L.W. 3137
(Aug. 6, 1997) 18n

Hawaiian Airlines, Inc. v. Norris,
512 U.S. 246 (1994) 18, 46

Hetzel v. Prince William County, Virginia,
___ U.S. ___, 118 S.Ct. 1210 (1998) 39, 42, 48

International Union v. Murata Erie North America,
980 F.2d 889 (3d Cir. 1992) 5n

Lingle v. Norge Division of Magic Chef,
486 U.S. 399 (1988) 21, 46

Livadas v. Bradshaw,
512 U.S. 107 (1994) 14, 21, 22, 29, 45, 46

*Local 1422, ILA, AFL-CIO v. S.C. Stevedores
Association, et al.*, C.A. No. 2:97-2886-21
(D.S.C. filed Sept. 22, 1997), on appeal
No. 98-1296 . . . . 9n

Local No. 391 v. Terry, 494 U.S. 558 (1990) . 16, 34, 36, 48

Mastrobuono v. Shearson Lehman Hutton, Inc.,
514 U.S. 52 (1995) 33

McDonald v. City of West Branch,
466 U.S. 284 (1984) . . . . passim

McKinney v. Missouri-Kansas-Texas R. Co.,
357 U.S. 265 (1958) 19

*Mitsubishi Motors Corp. v. Solar Chrysler-Plymouth,
Inc.*, 473 U.S. 614 (1985) 14, 19, 30, 31, 32, 49

Montes v. Shearson Lehman Brothers, Inc.,
128 F.3d 1456 (11th Cir. 1997) 36n

Nelson v. Cyprus Baghdad Copper Co., 119
F.3d 756 (9th Cir. 1997), *cert. denied*, ___
U.S. ___, 66 U.S.L.W. 3686 (April 20, 1998) . . 32, 42n, 48n

NLRB v. Magnavox Company, 415 U.S. 322 (1974) . 25, 48

Oncale v. Sundowner Offshore Services, Inc.,
___ U.S. ___, 118 S. Ct. 998 (1998) 27

Perry v. Thomas, 482 U.S. 483 (1987) 45

Prudential Insurance Co. of America v. Lai,
42 F.3d 1299 (9th Cir. 1994) 48n

Pryner v. Tractor Supply Co., 109 F.3d 354
(7th Cir.), *cert. denied*, ___ U.S. ___,
118 S. Ct. 294 (1997) 28, 42n, 44

*Rodriguez de Quijas v. Shearson/American
Express, Inc.*, 490 U.S. 477 (1989) 14

Shearson/American Express Inc. v. McMahon,
482 U.S. 220 (1987) 14, 35

Sine v. Local No. 992, Intern. Broth.,
644 F.2d 997 (4th Cir. 1981) 43n

Steele v. Louisville & N.R.. Co., 323 U.S. 192 (1944) . . . 23

Textile Workers Union v. Lincoln Mills,
353 U.S. 448 (1957) 23

Tran v. Tran, 54 F.3d 115 (2d Cir. 1995) 18n

U.S. Bulk Carriers v. Arguelles,
400 U.S. 351 (1971) 18n, 44

United Electrical, etc., Workers v. Miller Metal Products,
215 F.2d 221 (4th Cir. 1954) 43n

United Paperworkers Intern. Union v. Misco, Inc.,
484 U.S. 29 (1987) 18

*United Steelworkers v. Warrior &
Gulf Navigation Co.*, 363 U.S. 574 (1960) 16, 19

Vaca v. Sipes, 386 U.S. 171 (1967) 16, 37, 38

Varner v. National Super Markets, Inc.,
94 F.3d 1209 (8th Cir. 1996), *cert. denied*,
___ U.S. ___, 117 S.Ct. 946 (1997) 18n

Wright v. Universal Maritime Service Corp.,
121 F.3d 702 (July 29, 1997) 1, 40

Zipes v. Trans World Airlines, 455 U.S. 385 (1982) 32

STATUTES:

9 U.S.C. §§ 1 *et seq.* 14

9 U.S.C. § 1 43

28 U.S.C. § 1254(1) 2

29 U.S.C. §§ 151, *et seq.* 15

29 U.S.C. §§ 171, *et seq.* 15

29 U.S.C. § 173(d) 2, 17

29 U.S.C. § 185 . . . . 2, 44

29 U.S.C. § 206(d) 13

29 U.S.C. § 623(c) 26

42 U.S.C. § 1981a(c) 39

42 U.S.C. § 1983 14

42 U.S.C. § 2000e-5(c) 34

42 U.S.C. § 2000e-5(e) 32

42 U.S.C. § 2000e-5(f) 2, 32, 34, 39

42 U.S.C. §§ 12101 *et seq.* 2

42 U.S.C. § 12101 24

42 U.S.C. § 12102(2) 8

42 U.S.C. § 12111(2) 26

42 U.S.C. § 12112(b) 8

42 U.S.C. § 12117 . . . . 2, 32, 34, 39

42 U.S.C. § 12212 . . . . 2, 8, 40, 41

46 U.S.C. § 596 . . . . 18n, 44

46 U.S.C. § 597 44

The Civil Rights Act of 1991, § 118, codified
at 42 U.S.C. § 1981 note 40, 41

OTHER:

H.R. Conf. Rep. No. 596, 101st Cong., 2d Sess.
(1990), reprinted in 1990 U.S.C.C.A.N. 565 42

H.R. Rep. No. 40(I), 102d Cong., 1st Sess.,
(1991), reprinted in 1991 U.S.C.C.A.N. 549 43

H.R. Rep. No. 485, 101st Cong., 2d Sess.
(1990) 42-43

NLRB Memorandum on Collective Bargaining
and ADA (Sept. 1992), reprinted in ADA
MAN. (BNA) 70:1021 27

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1997
No. 97- 889

CEASAR WRIGHT,
Petitioner,
v.

UNIVERSAL MARITIME SERVICE CORP., et. al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR PETITIONER

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fourth Circuit is unreported. It is referenced in a Table at 121 F.3d 702 (July 29, 1997), and is reprinted at Petition for Certiorari, Appendix ("Pet. App.") 1a.

The Order of the United States District Court for the District of South Carolina, dated September 25, 1996, is unreported, and is reprinted at Pet. App. 6a. That Order adopted the ruling recommended by a Magistrate Judge in a Report dated June 14, 1996, reprinted at Pet. App. 19a. The further Order of the District Court, dated December 5, 1996, is reprinted at Pet. App. 14a.

The decision of the United States Court of Appeals for the Fourth Circuit in *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir.), *cert. denied,* ___ U.S. ___, 117 S. Ct. 432 (1996), on which the courts below relied without discussion, is reprinted, for convenient reference, at Pet. App. 34a.

JURISDICTION

Jurisdiction is conferred by 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This matter involves the enforcement of the Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq.* The pertinent portions of the Act, particularly 42 U.S.C. §§ 12117 (adopting 42 U.S.C. § 2000e-5(f)), 12212, are printed at Pet. App. 27a. This matter also involves 29 U.S.C. §§ 173(d) and 185.

STATEMENT OF THE CASE

A. Petitioner's Employment History

Petitioner was regularly employed as a longshoreman in the Port of Charleston, beginning in 1970, through the hiring hall operated by Local 1422, International Longshoreman's Association, AFL-CIO (ILA). His taxable income from this employment exceeded $82,000 in 1991. Joint Appendix ("JA") 51a ¶ 9. In early 1992, while working for respondent Stevens Shipping, petitioner fell off the top of a freight container, shattering his right heel and injuring his back. These injuries disabled him from waterfront employment for an extended period. His treating physician thought petitioner would probably be permanently and totally disabled from longshore employment, while other physicians expressed the opinion that petitioner could return to waterfront work. JA 50a. In May, 1994, petitioner settled his workers' compensation and other claims, including claims for permanent and total disability, for $250,000. JA 52a.

A major factor in petitioner's physical disability was a bony spike in his right heel that made walking extremely painful. In late 1994 the bony spike spontaneously resorbed. Petitioner's physician documented this improvement and found that petitioner was physically able to return to work. JA 53a.

In January, 1995, after almost three years off the job, petitioner returned to the hiring hall to seek assignments for work. On nine of the ten days from January 2 through January 11, 1995, petitioner was referred for employment by Local 1422, ILA, and worked for four of the respondent employers during those nine days. Each of these respondents accepted petitioner as qualified for his position, and none had any complaints about his work performance. Pet. App. at 21a; JA 54a ¶ 18. Some of these respondents asked for written approval from petitioner's treating physician for petitioner to return to work, and this was provided. JA 53a.

On January 11, 1995, the respondent employers agreed among themselves that they would all refuse to accept petitioner for work. In virtually identical letters to the president of Local 1422, ILA, the respondents stated that petitioner was previously "certified as permanently and totally disabled." They continued that "once an individual is certified as permanently and totally disabled, he is no longer qualified to perform longshore work of any kind." JA at 35a.

Petitioner immediately consulted with Benjamin Flowers, the president of Local 1422, ILA, his bargaining representative. As the District Court found, "Both parties agree that Plaintiff initially followed the proper procedure under the collective bargaining agreement for filing a grievance against Defendant." Pet. App. 16a. President Flowers wrote to the respondents to protest that the refusal to accept petitioner for work was a violation of the Americans with Disabilities Act and a "lockout" violating the bargaining agreement. (The agreement lacked a "nondiscrimination" clause.) The union president did not pursue a grievance for petitioner under the agreement; instead, he advised petitioner to retain private counsel to pursue a statutory claim under the Americans with Disabilities Act. By the time petitioner located counsel, just two weeks later, a grievance under the Bargaining Agreement was "out of time." JA 55a.

Petitioner promptly invoked his statutory rights by filing timely charges of discrimination with the Equal Employment Opportunity Commission (EEOC) against all respondents. After the EEOC issued a Notice of Right to Sue on each charge, petitioner filed this action in January, 1996.

Two months later, the United States Court of Appeals for the Fourth Circuit issued its opinion in the case of *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir. March 12, 1996), *cert. denied*, ___U.S. ___, 117 S. Ct. 432 (1996), which held that an applicable labor arbitration agreement "ousts a court of jurisdiction" to hear statutory claims of discrimination brought by individual employees. Petitioner then offered to arbitrate, but respondents refused. JA 58a.

B. The Collective Bargaining Agreement

The bargaining agreement in this case was adopted effective November 30, 1990. It was negotiated between the respondents and the South Atlantic & Gulf Coast District of the International Longshoremen's Association to cover "longshore work" in the Port of Charleston, a term that covered "all labor used in connection with loading or discharging ships, barges or other floating craft." JA 36a.[1]

The grievance and arbitration provisions were stated in Clause 15.(b) of the Agreement. That Clause did not define "grievances," except as "Matters under dispute which cannot be promptly settled between the Local and an individual Employer." JA 43a. Clause 15.(F) of the Agreement [known as a "zipper clause"] stated that the Agreement represented closure of negotiations, JA 45a - 46a:[2]

> The Union agrees that this Agreement is intended to cover all matters affecting wages, hours, and other terms and conditions of employment and that during the term of this Agreement the Employers will not be required to negotiate on any further matters affecting these or other subjects not specifically set forth in this Agreement. Anything not contained in this Agreement shall not be construed as being part of this Agreement.

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[1] In addition to a detailed definition of the scope of "longshore work," JA 36a-37a, the agreement addressed job classifications, wage rates, vacation and holiday pay, shift differentials, minimum hours of work after the day shift, special supplementary funds (container royalty and Guaranteed Annual Income), pension and welfare Funds (see Defendants' Motion for Summary Judgment, Exhibit B, Attachment 1); the commitment of the parties to adopt safe and efficient methods for stevedoring operations, JA 37a; the Employer's rights in hiring and discharging workers and assigning workers subject to various limitations, such as the "minimum gang structure" "required as determined by the class of cargo being handled by the gang," detailed matters not defined within the four corners of the collective bargaining agreement, JA 38a; misconduct and punishment for various offenses, JA 39a-42a; a prohibition on lockouts by the Employers and on work stoppages by the union, JA 42a-43a; collection of delinquent Employer contributions to pension and welfare funds, JA 43a; a grievance procedure, JA 43a-45a; and safety rules for various classes of cargo operations, including conditions disqualifying a worker from employment (intoxication and epilepsy). JA 46a-47a.

[2] A "zipper clause" defines, not the scope of arbitration, but the scope of the employers' exemption from participating in "mandatory bargaining" during the life of the collective bargaining agreement." *International Union v. Murata Erie North America*, 980 F.2d 889, 903 (3d Cir. 1992).

> All past port practices being observed may be reduced to writing in each port.

The Agreement also provided in Clause 15(E): "All interpretations of this Agreement will be made in accordance with the provisions of Clause 15." JA 45a. As to construction of the Agreement, the parties also adopted a "savings clause," Clause 17, that states: "It is the intention and purpose of all parties hereto that no provision or part of this Agreement shall be violative of any Federal or State Law." JA 47a.

Although the bargaining agreement covered many topics, it did *not* include a "nondiscrimination" clause: the agreement includes no express provisions whatever prohibiting discrimination by the Employers on the basis of race, gender, age, nationality, or disability. The Agreement makes no reference whatsoever to the Americans with Disabilities Act, nor to any other employment discrimination law. JA 55a ¶ 21. The only specific statute to which the Agreement refers is the Occupational Safety and Health Act. JA 46a.

In the Port of Charleston, there are three local unions (ILA affiliates with distinct work jurisdictions) and a number of other Employers who contract with one or more of these locals. When Local 1422, ILA, and an individual Employer have a "matter under dispute," the Agreement contemplates that they will have "such discussion" as may "promptly settle" the dispute.[3] If the parties cannot achieve a resolution, the "Matters under dispute . . . shall, no later than 48 hours after such

discussion, be referred in writing covering the entire grievance to a Port Grievance Committee" consisting of two representatives of Management and two representatives of the union. The grievance may be settled at the Port level. JA 43a-44a.

Only if "this Port Grievance Committee cannot reach an agreement within five days after receipt of the complaint" can the matter "be referred to the Joint Negotiating Committee, which will function as a District Grievance Committee . . . ." JA 44a. The Joint Negotiating Committee has five members from Management and five members from the Union. JA 45a. When sitting as the District Grievance Committee, the meeting must be attended by at least three (3) regular Employer members and three (3) regular Union members and each side has four votes. JA 44a.

The Agreement further provides, JA 44a-45a:

> A majority decision of this [District Grievance] Committee shall be final and binding on both parties and on all employers signing this Agreement. In the event the Committee is unable to reach a majority decision within 72 hours after meeting to discuss the case, it shall employ a professional arbitrator. . . .
>
> In the selection of an arbitrator, thought will be given to a person who is knowledgeable and familiar with the problems of the Longshore industry.
>
> Any decision in favor of the employee involving monetary aspects of discharge shall require the employer involved to make financial restitution from the time of the complaint concerned, whereas decisions involving working methods or interpretations shall take effect seventy-two hours after being rendered.

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[3] The Agreement mentions explicitly several types of issues that will be referred to the Port Grievance Committee if the parties cannot resolve them. These include (1) safe and efficient methods of operation, JA 37a-38a; (2) a claim of "hardship . . . because of unreasonable or burdensome conditions." JA 38a; (3) "where work methods or operations materially change in the future," *id.*; (4) "misconduct charges" against individual workers, JA 42a; and (5) contributions allegedly delinquent to pension and welfare funds (referred directly to District Grievance Committee). JA 42a.

C. Claim under the Americans With Disabilities Act

The petitioner's union received virtually identical letters from four stevedoring companies, all stating, "Once an individual is certified as permanently and totally disabled, he is no longer qualified to perform longshore work of any kind." JA 35a. This statement, petitioner believes, was an unusually clear violation of the Americans with Disabilities Act.

A major purpose of the ADA is to ensure that employment decisions are based on an individualized determination of a person's actual abilities and limitations. The Act protects "individuals with a disability," and defines a disability as: "(1) A physical or mental impairment that substantially limits one or more of the major life activities of such individual; (2) a record of such an impairment; or (3) being regarded as having such an impairment." 42 U.S.C. § 12102(2).

Among the ADA's specific prohibitions are: (a) "limiting . . . or classifying a job applicant or employee in a way that adversely affects . . . opportunities," and (b) "utilizing standards or criteria that have the effect of discrimination on the basis of disability. . . ." 42 U.S.C. §§ 12112(b)(1), (b)(3)(A). Respondents' letters constitute an admission that petitioner was being permanently barred from his occupation because he was regarded as being "permanently and totally disabled." They also evidenced discrimination based on a "record" of disability, utilizing both an impermissible "limitation or classification" and "standards or criteria" that screen out people with disabilities.

D. Proceedings Below

On cross motions for summary judgment, a Magistrate Judge recommended that petitioner's suit "be dismissed without prejudice for want of jurisdiction," on the authority of *Austin.* Pet. App. at 26a. The District Judge agreed in an Opinion dated September 25, 1996. He later denied a timely Motion for Reconsideration by Order dated December 5, 1996.[4]

Since the employers had already refused to arbitrate the claims, the dismissal of the suit without either compelling arbitration or retaining jurisdiction ended the statutory claims. The result is that petitioner has been permanently excluded from his career occupation without having a hearing in any forum on the merits of his ADA claims.

Petitioner prosecuted a timely appeal to the Court of Appeals. That Court affirmed the judgment on July 29, 1997, holding that Wright's only recourse was a union-sponsored grievance, and that he had no right to sue under the ADA. The Court referred to the arbitration clause, but quoted instead from the "zipper clause," 15(F):

> The arbitration clause at issue is particularly broad. The clause states that the "Union agrees that this Agreement is intended to cover all matters affecting wages, hours, and other terms and conditions of employment."

Pet. App. 4a. After confusing the zipper clause with the arbitration clause, the Court continued,

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[4] In July, 1996, after the decision in *Austin v. Owens-Brockway Glass Container*, the union hiring hall again referred petitioner for work. Petitioner was again refused work. This time the union pursued a grievance. Respondents refused to process the grievance. The union filed suit to compel arbitration. *Local 1422, ILA, AFL-CIO v. S.C. Stevedores Association, et al.*, C.A. No. 2:97-2886-21 (D.S.C. filed Sept. 22, 1997). Because the union's suit was not filed within six months of January 11, 1995, when the petitioner was first refused work, the suit has been dismissed as untimely. The union has appealed to the Fourth Circuit, Docket No. 98-1296.

> An employer need not provide a laundry list of potential disputes in order for them to be covered by an arbitration clause. For example, in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), the Supreme Court held that a plaintiff was required to submit his ADEA claim to arbitration where the arbitration agreement covered "any dispute, claim or controversy." *Id.* at 23. The language of the CBA at issue in this case is equally broad, covering "all matters" regarding "terms and conditions of employment." This language easily encompasses Wright's ADA claim.

A timely petition for certiorari was granted on March 2, 1998.

SUMMARY OF ARGUMENT

The Americans with Disabilities Act is one of many Congressional enactments that guarantee minimum substantive rights to all individual workers covered by each statute. In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), this Court held that these substantive statutory rights were independent of labor agreements and found that these rights could be enforced judicially, either in addition to or instead of contract remedies.

For organized workers only, Congress created a parallel statutory regime promoting and regulating the exercise of collective economic rights, including the "core" collective right, the right to strike. Two statutes regulate collective activity. The NLRA created the National Labor Relations Board as an independent federal agency to oversee labor organizing and collective bargaining. The LMRA created a system of "industrial self-government" in which unions exchanged the right to strike, when disputes arose, for the right to have an independent private tribunal make a final and binding resolution of disputes about the "interpretation or application" of the labor agreement.

Statutes conferring individual rights emphasize "make whole" relief for the individual worker, whether or not he is covered by any labor agreement. Under the NLRA and the LMRA, statutes conferring collective rights, remedies are available for individuals, but are subordinated to the purposes of "national labor policy," with the primary objective of promoting industrial peace.

The LMRA established the binding authority of the grievance-arbitration mechanism for resolving disputes about the application or interpretation of labor agreements. The Railway Labor Act did the same for railroads and airlines. Those mechanisms were not created to resolve disputes involving the "minimum substantive rights" guaranteed to workers by employment discrimination statutes, and parties to labor agreements do not generally intend to use the grievance mechanism for that purpose, except where they explicitly agree otherwise. In particular, most unions, like the union representing petitioner, do not wish to undertake the conflicting interests inherent in being a "gatekeeper" for the statutory rights of individuals under employment discrimination statutes.

Logically, the enforcement of statutory rights by individuals who seek personal "make whole" relief should be controlled by those individuals. In contrast, access to remedies for workers under the NLRA is controlled by the General Counsel of the NLRB, through his discretionary authority to issue unfair labor practice complaints. Access to remedies for workers under "industrial self-government" is controlled by unions, as the official representatives of the collective economic power of those workers. In this context, only the control of enforcement of statutory rights by the injured worker is properly analogous to commercial arbitration.

In the securities industry's arbitration regime, the Securities and Exchange Commission enforces standards for arbitration, and no employee risks forfeiting rights because of any special procedural rules of that regime. In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), this Court held that, on the record there presented, the industry arrangements were adequate to assure effective vindication of statutory rights to be free of age discrimination.

In stark contrast, if statutory claims are subject to "final and binding" resolution under labor grievance procedures, union control of the grievance mechanism and the technical rules of that mechanism can easily combine, as in this case, to prevent strong claims from ever receiving a hearing on the merits. Both union control and extremely short periods for filing claims are well suited as an extension of collective bargaining to adjust contract disputes. To transform those grievance mechanisms to protect statutory rights, such as by recognizing the statutes of limitations enacted by Congress, would undermine the effectiveness of the grievance mechanism as part of the continuing process of bargaining.

Congress has never authorized unions to waive any individual "minimum substantive rights" -- including the right to a judicial forum -- under any employment discrimination statute: in enacting the ADA, Congress explicitly endorsed *Alexander*; the Federal Arbitration Act does not apply to this agreement; and this Court has repeatedly rejected arguments that Section 301 of the LMRA requires arbitration of claims under federal statutes.

Alexander v. Gardner-Denver controls this case. Since remedies under labor agreements are primarily intended to further national labor policy, the grievance-arbitration procedures for enforcing those remedies are very different from commercial arbitration and give individual workers much less opportunity to enforce statutory rights than is provided in

commercial arbitration. *Gilmer* and the cases it applied have no relevance to labor grievance mechanisms. The decision of the court of appeals should be reversed and the case remanded for petitioner to proceed on the merits of his claim under the ADA.

ARGUMENT

Introduction

Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), established a "bright-line" rule: a mandatory arbitration clause in a labor agreement does not bar an employee's access to the courts to prosecute a claim based on a federal statute because, *inter alia*, the union, rather than any individual employee, controls the exercise of the grievance-arbitration procedure under a collective bargaining agreement and any individual's "waiver" of the judicial forum would have to be "voluntary and knowing." The principles of *Alexander* were amplified in *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728 (1981), which held that wage and hour claims under the Fair Labor Standards Act, 29 U.S.C. § 206(d), were not precluded by a decision of a joint labor-management dispute board, and that other workers who did not file grievances could go directly to federal court. This Court also applied these principles in *McDonald v. City of West Branch*, 466 U.S. 284 (1984), which held that a First Amendment claim brought in federal court under 42 U.S.C. § 1983 was not barred by an unfavorable decision in an arbitration of a grievance filed under a bargaining agreement.

In *Alexander*, even as this Court emphasized the importance of the right of ultimate resort to the judicial forum to address statutory claims, the Court also endorsed the use of contractual procedures to resolve disputes through application of the bargaining agreement, 415 U.S. at 55:

> . . . the grievance-arbitration machinery of the collective-bargaining agreement remains a relatively inexpensive

> and expeditious means for resolving a wide range of disputes, including claims of discriminatory employment practices. Where the collective-bargaining agreement contains a nondiscrimination clause similar to Title VII, and where arbitral procedures are fair and regular, arbitration may well produce a settlement satisfactory to both employer and employee, . . . eliminat[ing] those misunderstandings or discriminatory practices that might otherwise precipitate resort to the judicial forum.

After *McDonald*, this Court decided that statutory claims were presumed to be within the scope of predispute agreements for mandatory arbitration in commercial and securities agreements, and were to be enforced under the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq. Mitsubishi Motors Corp. v. Solar Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989) (the "*Mitsubishi* Trilogy").

Then in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), this Court applied the *Mitsubishi* Trilogy and the Federal Arbitration Act to require arbitration of a claim under the Age Discrimination in Employment Act where a registration statement executed by a securities broker required arbitration of disputes. The Court carefully distinguished that individual agreement, which left the individual employee with control of the prosecution of his claims before the arbitrator, from the collective bargaining context, where the arbitrator's authority was usually limited and the union (not the aggrieved employee) controlled the presentation of the claim. Three years later, in *Livadas v. Bradshaw*, 512 U.S. 107, 127 n.21 (1994), this Court reaffirmed the principle that workers' statutory rights were not to be waived for them by a union contract.

The unique policy considerations governing labor arbitration clauses have been recognized by every federal court

of appeals to address the issue since *Gilmer*, with the exception of the court below.[5] These policy concerns arise from the three parallel, sometimes overlapping regimes created by Congress to regulate employee-employer relationships in the organized shop. First, in the National Labor Relations Act (Wagner Act) (1935), 29 U.S.C. §§ 151, *et seq.*, Congress authorized labor organizations that obtained majority worker support to be the exclusive bargaining representative in a workplace and established an independent agency, the National Labor Relations Board, to adjudicate disputes about the union's exercise of collective economic rights and the employer's opposition to union influence. Second, in Titles II and III of the Labor Management Relations Act (Taft-Hartley Act) (1947), 29 U.S.C. §§ 171, *et seq.*, Congress endorsed an exclusive system of "industrial self-government," in which disputes between the parties about the application of the bargaining agreement ("grievances") would be resolved by the parties or by a private umpire -- an arbitrator, a joint labor-management council -- with virtually no court review of the umpire's decisions. Third, in a wide variety of statutes addressing the rights of workers, including pay and freedom from discrimination, Congress provided "minimum substantive guarantees to individual workers." *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728, 737 (1981).

These parallel regimes had very different purposes. The two labor relations statutes were designed to regularize and legitimize the exercise of the collective economic power of workers (NLRA) and to establish labor peace by creating an institutional mechanism to resolve disputes about collective rights under the bargaining agreement ("grievances") without the continual disruption of strikes or other job actions (LMRA). Although remedies for individual workers were created in both these regimes, these remedies were strictly circumscribed. The

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[5] See cases cited, Petition for Certiorari at 10.

General Counsel for the NLRB has virtually unreviewable discretion as to whether to issue a complaint on an unfair labor practice charge. *Vaca v. Sipes*, 386 U.S. 171, 182 (1967). Both collective regimes were primarily directed at the implementation of collective rights and "national labor policy," not at the protection of the rights of individual workers. See, e.g., *Local 391 v. Terry*, 494 U.S. 558, 573 (1990) (NLRA "concerned primarily with the public interest in effecting federal labor policy"); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960) ("A major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement."); and *Vaca v. Sipes*, 386 U.S. at 191 (LMRA contemplates union will supervise the grievance process and "settle grievances short of arbitration.").

On the other hand, federal statutes that guaranteed rights both to organized workers and to individual, unrepresented employees, were intended by Congress to "provide minimum substantive guarantees to all employees." The courts' remedial powers under these statutes, such as Title VII, were designed to provide "make whole" relief to the individual worker. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975). These rights are personal, and have never been considered to be within the authority of the labor organization. Based on the individual character of statutory protections against discrimination and based on the strong Congressional policy against union waivers of rights of the workers they represent, *Alexander* should be reaffirmed. All three distinctions this Court noted in *Gilmer* support this result: (1) the union and management did not agree to grieve statutory claims; (2) due to majoritarian control, the union should not have authority to waive or compromise personal statutory rights; and (3) no statute authorizes a union-management agreement to abrogate personal judicial remedies. In addition, the grievance mechanism here, as in most labor agreements, is not suited for effective vindication of personal statutory rights.

I. By statute, tradition, function, and intention, "grievances" under a labor agreement, including the agreement here, are limited to disputes about the application of the collective bargaining agreement.

Petitioner's representative did not intend that the bargaining agreement would be used to process statutory claims. Benjamin Flowers, the president of Local 1422 who wrote letters of protest to the employers and advised petitioner to retain an attorney to sue under the ADA, was the union representative who had signed the bargaining agreement. JA 47a; Plaintiff's Motion to Compel Arbitration, Exhibits 2, 3, 4. The agreement has never been applied to a statutory discrimination claim. Statement of respondents' counsel, Transcript of Hearing on Motion for Summary Judgment, May 22, 1996, page 51, line 13.

In *Gilmer*, 500 U.S. at 35, this Court correctly observed that the controversy was completely different from the *Alexander* line of cases, "since the employees there had not agreed to arbitrate their statutory claims and the labor arbitrators were not authorized to resolve such claims. . . ." This limitation is often expressly stated in bargaining agreements, but it derives from the Congressional declaration that the function of the grievance-arbitration process is to apply the bargaining agreement.

The generic meaning of "grievance" as limited to the application of the bargaining agreement was enacted in 1947 in Section 203(d) of the Labor Management Relations Act, 29 U.S.C. §173(d):

> Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of *grievance disputes arising over the*

> *application or interpretation of an existing collective bargaining agreement*. . . . [Emphasis added.]

As this Court observed in *United Paperworkers Intern. Union v. Misco, Inc.*, 484 U.S. 29, 36 (1987):

> Collective-bargaining agreements commonly provide grievance procedures to settle disputes between union and employer with respect to the interpretation and application of the agreement and require binding arbitration for unsettled grievances.

This understanding of "grievances" is also congruent with parallel labor statutes. This Court has held that "grievances," as used in the Railway Labor Act, is "a synonym for disputes involving the application or interpretation of a CBA." *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 255 (1994) (state law "whistleblower" claim not subject to the statutory grievance procedure for "minor disputes" and National Adjustment Board). Before *Norris*, this Court had unanimously held that claims under federal statutes are not subject to the statutory grievance procedure for "minor disputes" and the Adjustment Board. *Atchison, T. & S.F.R. Co. v. Buell*, 480 U.S. 557 (1987) (FELA).[6]

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[6] As noted *infra* , pp. 47-48, the statutory procedure is completely independent of the contract mechanism. This Court has never required "exhaustion" of contract dispute procedures before presenting a statutory claim, either under the Railway Labor Act, see *Buell*, or under Section 301. See *U.S. Bulk Carriers v. Arguelles*, 400 U.S. 351, 357 (1971) (grievance not prerequisite to seaman's statutory wage and penalty claim under 46 U.S.C. § 596); *McKinney v. Missouri-Kansas-Texas R. Co.* 357 U.S. 265, 268-70 (1958) (contract grievance not prerequisite to suit asserting seniority rights under Universal Military Training and Service Act). In most of the appellate cases that have rejected *Austin*, no grievance was filed. See cases cited, Pet. at 10 (*Varner, Harrison, Brisentine, Tran*). *Alexander* and subsequent cases make clear there is no "exhaustion" requirement. See 415 U.S. at 47 and *Electrical Workers v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976) (grievance does not "toll" the statutory time for filing a claim under Title VII).

Because of this consistent interpretation by Congress and this Court of the term "grievance" in the grievance-arbitration mechanism, the labor grievance process is completely different from the sophisticated commercial arbitration mechanism described in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 634 n.18, 638 n.20 (1985), and it is substantially different from commercial arbitration in the securities industry, the arbitral regime this Court applied to Mr. Gilmer's claim under the ADEA. The wide gulf between labor arbitration and commercial arbitration was described in the *Steelworkers* Trilogy, *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 578, 580-81 (1960):

> In the commercial case, arbitration is the substitute for litigation. Here arbitration is the substitute for industrial strife. . . . For arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself.
>
> * * * * *
>
> Courts and arbitration in the context of most commercial contracts are resorted to because there has been a breakdown in the working relationship of the parties; such resort is the unwanted exception. But the grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government. Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their

solution in a way which will generally accord with the variant needs and desires of the parties.[7]

It is crucial to remember that the *parties to the labor grievance* are the District Union, the Employers' Association, and the individual employer(s). JA 36a, 47a. The individual workers are not parties.[8] Individuals on either the labor side or the management side can request that a "matter in dispute" about the application of the agreement be submitted to the grievance process, but, for a worker, only the union can formally

initiate and proceed with a "grievance" through the grievance mechanism.

Thus, the grievance mechanism is limited to application of the agreement, unless the parties clearly define a "grievance" to include alleged violations of rights deriving from public law. Violations of discrimination statutes were defined as "grievances" in *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 879-80 (4th Cir.) ("This Contract shall be administered in accordance with the applicable provisions of the Americans With Disabilities Act. . . . any disputes under this Article as with all other Articles of this contract shall be subject to the grievance procedure."), *cert. denied*, ___ U.S. ___, 117 S. Ct. 432 (1996). Only specific language like that found in *Austin* could enable union and management to submit an individual worker's claim of a violation of a federal statute to grievance-arbitration.

This Court's decisions under Section 301 have consistently taken this approach. (See *infra* Argument IV.C.) Both in *Lingle v. Norge Division of Magic Chef*, 486 U.S. 399 (1988), and *Livadas v. Bradshaw*, 512 U.S. 107 (1994), as well as in earlier cases, the Court has held that labor agreements do not require arbitrating state law claims that do not depend on interpreting the bargaining agreement, unless the agreement expresses a "clear and unmistakeable" intent to submit such claims to arbitration. Such intent is never found.

The court below thus erred in interpreting the general grievance provisions of the labor agreement to require arbitration of petitioner's federal statutory ADA claim.

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[7] Because the written agreement here has apparently evolved by accretion over many years, it is a collection of provisions that are applied year in and year out by permanent industry committees. The first step in the grievance process is a "Port Grievance Committee"; the union representatives come from several distinct local labor organizations in the Port (ILA locals with distinct work jurisdictions). If the "matter under dispute" is not resolved at the Port level, "the written record of the dispute shall be referred to the Joint Negotiating Committee, which will function as a District Grievance Committee. . . ." JA 44a.

At either level, if a majority develops for a disposition of the grievance, the matter ends there. Period. Neither the local union nor the particular employer involved in the dispute can appeal from a majority vote. No arbitrator enters the picture unless the industry committees deadlock at both the Port level and the District level.

The Seniority Board Agreement has no relevance to an *employer's* refusal to hire (as opposed to a gang leader or header refusing to hire). If it did, the complaint process under the Seniority Board Agreement is even more truncated. The Seniority Board is composed of two union representatives and two Employer representatives. JA 48a-49a. A determination by a majority of the Board is "final and binding." If the Board "shall be unable to reach a determination of a particular dispute, the dispute shall be submitted to a committee of two [one union and one management, both from outside the Port of Charleston] for final determination." If these committee members deadlock, the grievant has no further appeal.

[8] The Fourth Circuit's assertion in *Austin* that the worker was a "party" was a fundamental error in that court's premise from which the majority reasoned to an erroneous conclusion. 78 F.3d at 883 n.2.

II. Because the collective bargaining process is designed to be controlled by the majority, the rights of victims of discrimination cannot be waived by a bargaining representative, and the union here did not intend to waive those rights.

In *Alexander*, in discussing why the award made by an arbitrator who had heard the contract claim was not automatically entitled to deference by the federal court, this Court stated, 415 U.S. at 58 n.19, the concern that individual statutory rights would be compromised in the interest of the majority. The Court observed that "a breach of the union's duty of fair representation may prove difficult to establish." Seven years later, in *Barrentine*, this Court relied on the potential for compromise of individual rights as the first reason for denying preclusion to the decision of the joint union-management council that denied a grievance stating a wage claim. 450 U.S. at 742. Continuing to today, the concern that the majority will decide to forego a valid individual statutory claim has been a principal reason this Court has refused to allow grievance-arbitration remedies in labor agreements to supplant judicial remedies for violation of federal statutes. See *McDonald v. City of West Branch*, 466 U.S. 284 (1984); *Gilmer*, 500 U.S. at 35 (1991); *Livadas*, 512 U.S. at 127 n.21 (1994).

These concerns dictate that imprecise language in bargaining agreements should not be construed as waiving minority rights. (See cases under Section 301, *infra*, IV.C.)

The risk of majority waiver in pursuing an individual claim is substantial. The negotiations that lead to the terms of the bargaining agreement (the pre-dispute agreement that respondents assert waived petitioner's judicial remedies), present an even greater risk of the majority's compromising minority rights, since the numerous considerations, all at issue at the same time, make it impossible to identify the *quid pro quo* for compromising minority rights.

A. The union's role derives from its authority to represent workers in exercising the *collective* right to strike, and in exercising the collective rights bargained for in relinquishing the right to strike, not by compromising statutory rights of minorities.

As this Court noted in *Barrentine*, 450 U.S. at 735: "[T]o promote industrial peace, the interests of some employees in a bargaining unit may have to be subordinated to the collective interests of a majority of their co-workers." The Court had earlier observed in *Alexander*, 415 U.S. at 54, "The primary incentive for an employer to enter into an arbitration agreement is the union's reciprocal promise not to strike," citing *Boys Markets v. Retail Clerks Union*, 398 U.S. 235, 248 (1970). *See also, e.g., Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 455 (1957). The union is not permitted to negotiate away the rights of a protected minority in return for concessions that benefit the majority of workers in the unit. *Steele v. Louisville & N.R.. Co.*, 323 U.S. 192 (1944).

The arbitration clause and the scope of its application must be interpreted consistently with its origins in the union's relinquishing the collective right to strike, and not as a waiver of individual rights to which workers are entitled under federal statutes applicable to those workers as individuals.[9] The Fourth Circuit's view, as stated in *Austin*, 78 F.3d at 885, confuses the fundamental nature of the collective bargain -- relinquishment of the right to strike as *quid pro quo* for the right to arbitrate disputes under the collective bargaining agreement -- by adding relinquishment of individuals' statutory rights to the mix of concessions, notwithstanding that this Court has never authorized waiver by the union of workers' individual rights.

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[9] "Since an employee's rights under Title VII may not be waived prospectively, existing contractual rights and remedies against discrimination must result from other concessions already made by the union as part of the economic bargain struck with the employer." *Alexander v. Gardner-Denver Co.*, 415 U.S. at 52.

As this Court observed in *Alexander*, since the union exercises the collective rights of workers, it "may waive certain statutory rights related to collective activity, such as the right to strike." 415 U.S. at 51. But in exercising that exclusive authority, the union cannot discriminate against minorities -- whether the worker be a member of a minority ethnic group; a member of a disadvantaged gender; a worker of an advanced age; a non-member or dissident member of union; or an "individual with a disability." For example, if the union systematically disadvantages minority workers by refusing to process grievances for a class of minority workers, it violates Title VII. *Goodman v. Lukens Steel*, 482 U.S. 656 (1987).

As discussed in *Alexander* and *Barrentine*, many federal employment statutes are "designed to provide minimum substantive guarantees to individual workers." 450 U.S. at 737. Congress has clearly stated that the purpose of the Americans with Disabilities Act is to provide such "minimum substantive guarantees" for "*individuals* with disabilities [emphasis added]," in many spheres of social activity, including employment. 42 U.S.C. §§ 12101(a), (b). By the nature of the enactments, all employment discrimination statutes are "designed to provide minimum substantive guarantees," *i.e.*, protection from discrimination, "for individual workers."

As with the Title VII rights discussed in *Alexander*, the "substantive guarantees" to be free from discrimination cannot be waived prospectively. It would defeat the "paramount purpose" of each Congressional enactment to allow an employer or a union -- separately or in concert -- to condition employment on waiver of substantive statutory guarantees -- with the employee left to "take it or leave it." Such a policy would allow sophisticated but unscrupulous business enterprises that are "covered employers" under the terms of the ADA and other statutes to "opt out" of that coverage by conditioning all jobs on waiver of those rights.

Unions, as well as employers, can violate the ADA. For example, if an employee proposes several options to accommodate his disability, the employer may object to one proposal and the union may object both to that proposal and to all other alternative accommodations requested. The bargaining agreement cannot commit to grievance-arbitration the worker's rights against the union, which has an express conflict. Since the union could not "waive" judicial remedies for claims filed jointly against the union and employer, it should not have the power to waive judicial remedies for any claims. *Compare NLRB v. Magnavox Company*, 415 U.S. 322, 325 (1974). But for this case, the Court need not decide the limits on a union's power to waive individual remedies; the Court need only find that a bargaining agreement that is silent about the issue will not be construed to waive a worker's access to the courts.

B. The Union's exclusive control of the grievance process makes labor arbitration unsuitable for enforcing minimum statutory standards for individuals.

When this Court decided *Gilmer*, Justice White emphasized that *Alexander* and its progeny, on which petitioner relies, were distinguishable from *Gilmer*, 500 U.S. at 35:

> [B]ecause the arbitration in those cases occurred in the context of a collective bargaining agreement, the claimants there were represented by their unions in the arbitration proceedings. An important concern therefore was the tension between collective bargaining representation and individual statutory rights. . . .

This Court has identified two related reasons for this concern: (1) the union often faces conflicting demands, which range from reluctance to accuse management of racism or sexual harassment, to outright conflicts of interest when the union is charged with discrimination; and (2) the union's decisions about pursuing a grievance can be reviewed only in a suit for breach of the duty of fair representation (DFR), an imprecise and inequitable means of enforcing statutory rights.

1. Conflicting demands and conflict of interest.

In *Alexander*, this Court noted, 415 U.S. at 58 n.19:

> In arbitration, as in the collective bargaining process, the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit. . . . Moreover, harmony of interest between the union and the individual employee cannot always be presumed, especially where a claim of racial discrimination is made. . . . Congress thought it necessary to afford the protections of Title VII against unions as well as employers. [Citations omitted.]

Congress also "thought it necessary to afford the protections" of the Americans with Disabilities Act as to unions. 42 U.S.C. § 12111(2). ("The term 'covered entity' means an employer, employment agency, labor organization, or joint labor-management committee.") Congress has expressly prohibited discrimination by unions in every modern federal employment discrimination statute. *See, e.g.*, 29 U.S.C. § 623(c) (ADEA). The union itself may be guilty of discrimination, either in hiring or admission to membership, or in processing grievances against the employer. *Goodman v. Lukens Steel*, 482 U.S. 656 (1987).

Even if the union does not actively discriminate, it may be inhibited in its response to a statutory claim because other workers in the same bargaining unit are discriminating against the claimant or because other workers resent the relief the claimant seeks. Other workers can create a "hostile work environment" that violates any of the federal anti-discrimination

statutes. While this type of claim is currently most commonly pursued in sexual harassment cases, e.g. *Oncale v. Sundowner Offshore Services, Inc.*, ___ U.S. ___, 118 S.Ct. 998 (1998), and in claims of harassment of a racial or ethnic minority employee, a "hostile environment" can also be created for a worker with a disability protected by the ADA. For example, a union member might reveal that a co-worker is HIV-positive, and the infected employee might be shunned by other workers in the unit.

A related problem appears when the relief sought by the victim of discrimination requires resources the union considers scarce. As this Court observed in *Barrentine*, 450 U.S. at 742:

> a union balancing individual and collective interests might validly permit some employees' statutorily granted wage and hour benefits to be sacrificed if an alternative expenditure of resources would result in increased benefits for workers in the bargaining unit as a whole.

Unions may also be reluctant to discuss proposals for "reasonable accommodation" that an individual with a disability requests under the ADA. The National Labor Relations Board has declared that a union's refusal to bargain over a proposed accommodation would violate § 8(b)(3) of the National Labor Relations Act. NLRB Memorandum on Collective Bargaining and ADA (Sept. 1992), reprinted in ADA MAN. (BNA) 70:1021. Uncertainty about the scope of obligations under the ADA makes the union's position especially precarious.

The on-going relationship between the union and the employer may also make the union reluctant to assert claims of discrimination. Allegations of racial discrimination are a "hot-button" issue, which unions often seek to avoid because of the adverse effect such claims have on the bargaining relation. See *Goodman v. Lukens Steel Co.*, 482 U.S. at 667-68 (union asserted it omitted "racial discrimination claims in grievances claiming other violations of the contract . . . because the employer would 'get its back up' if racial bias was charged, thereby making it more difficult to prevail"). Similarly, a claim of sexual harassment by a supervisor might be so potentially explosive that the union, concerned with everyday contacts with the supervisor, would hesitate to pursue the complaint unless the victim presented overwhelming corroborating evidence.

2. Unions have wide latitude in handling grievances.

As this Court observed in discussing the Fair Labor Standards Act claims at issue in *Barrentine*, 450 U.S. at 742:

> even if the employee's claim were meritorious, his union might, without breaching its duty of fair representation, reasonably and in good faith decide not to support the claim vigorously in arbitration.

The union may make such a decision simply on the basis of allocation of its own scarce resources, even if the claim does not initiate conflicting demands within the unit. As another court of appeals observed in rejecting the rationale of *Austin*, in *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 362 (7th Cir.), *cert. denied*, ___ U.S. ___, 118 S.Ct. 294 (1997):

> [T]he union has broad discretion as to whether or not to prosecute a grievance. . . . Corresponding to this expansive and ill-defined discretion, the scope of judicial review of its exercise is deferential. [Citations omitted.] The result is that a worker who asks the union to grieve a statutory violation cannot have great confidence either that it will do so or that if it does not the courts will intervene and force it to do so. . . .

"[A] breach of the union's duty of fair representation may prove difficult to establish." *Alexander*, 415 U.S. at 58, n.19.

The facts of this case are a particularly compelling example of the difficulty in proving a breach of duty by the

bargaining representative. Petitioner immediately sought the union's assistance. When the matter could not be resolved by initial discussions with the employer, the president of the local union advised petitioner to retain private counsel to pursue his statutory remedies under the ADA, rather than his contract remedies. Since the bargaining agreement lacks any "non-discrimination" clause, the statutory remedies fit the claim more closely. This was not an unusual position for a union to take; compare *Brisentine v. Stone & Webster Engineering Corp.*, 117 F.3d 519, 521 (11th Cir. 1997), where the local union also declined to pursue a contract claim of disability discrimination.

As respondents have repeatedly pointed out, most recently in Respondent's Brief in Opposition to Certiorari, page 14, petitioner has not accused the union of a breach of the duty of fair representation. How could petitioner have possibly prevailed on a DFR claim, which requires proof of arbitrary or discriminatory action by the union? In January, 1995, the union had no notice that the Fourth Circuit would "overrule" *Alexander v. Gardner-Denver Co.*, a year later. It was certainly not arbitrary or irrational for the union to think that petitioner had an administrative and judicial remedy; to this day, every other appellate court has agreed that *Alexander* is still good law, as this Court stated in *Gilmer* and *Livadas*.

As Justice White observed for the court in *Gilmer*, none of the concerns discussed in this section of the argument had any application in that case. But in this case, concerns of majority waiver of minority rights are as fresh and compelling as they were when this Court decided *Alexander*, *Barrentine*, *McDonald*, *Gilmer*, and *Livadas*.

III. This bargaining agreement, like most labor agreements, does not provide a mechanism for adequately vindicating rights under employment discrimination statutes.

In *Gilmer*, the employer compelled the employee to arbitrate his claims, rather than to sue on the claims in court. Here, the employers have successfully avoided ever defending the claim on the merits. The cursory manner in which the courts below have denied petitioner any hearing on the merits of his ADA claim demonstrates how difficult it is to use labor grievance-arbitration "effectively" to "vindicate a statutory cause of action. . . ."

In *Gilmer*, this court reiterated that an employee seeking statutory remedies cannot be required to "forgo the substantive rights afforded by the statute. . . ." 500 U.S. at 26, quoting *Mitsubishi*, 473 U.S. at 628. Thus, one requirement for enforcement of a compulsory arbitration agreement is that "'the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum. . . .'" 500 U.S. at 28, quoting *Mitsubishi Motors*, 473 U.S. at 637. This Court has also emphasized that if arbitration "clauses operated . . . as a prospective waiver of a party's right to pursue statutory remedies . . . , we would have little hesitation in condemning the agreement as against public policy." *Mitsubishi Motors v. Soler Chrysler-Plymouth*, 473 U.S. at 637 n.9. The unique nature of labor grievance mechanisms as "part and parcel of the collective bargaining process," prevent individuals from effectively vindicating causes of action based on statutes that "provide minimum substantive guarantees" for workers.

A major concern expressed by this Court in *Alexander* was that the grievance-arbitration mechanism in labor agreements was not adequate for the determination of statutory claims of employment discrimination. 415 U.S. at 56-58. These concerns remain fresh today even after compulsory arbitration has extended *commercial* arbitration to statutory claims. *See, e.g.*, *Gilmer*, 500 U.S. at 34 n.5.

Through wholesale modifications, perhaps the labor grievance mechanism could be transformed to adopt the procedures of modern commercial arbitration. But such transformation would either destroy the effectiveness of grievance mechanisms in their current forms, or it would create an acute tension between the limited procedures and rights of workers in adjustment of contract grievances, on one hand, and the more formal, sophisticated procedures to vindicate statutory rights, on the other. The "bright-line" rule of *Alexander* has worked well to preserve the collaborative bargaining processes reflected in existing grievance mechanisms, and also to preserve the judicial forum that Congress adopted for the vindication of statutory rights in employment discrimination cases.

A. The Grievance Mechanisms are incompatible with vindication of statutory rights.

Grievances are required to be asserted in extraordinarily short time periods. The bargaining agreement in this case is typical of labor agreements. An extremely short time is allowed to assert a grievance: "no later than 48 hours after such discussion" if the grievance "cannot be promptly settled." JA 43a. In this case, although petitioner retained an attorney within 15 days, petitioner's ADA claim was already defaulted by the union's failure to pursue the grievance procedures within 48 hours. JA 55a.[10]

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[10] Petitioner argued below that he was entitled to proceed in court because this application of the grievance procedure violated the ADA's 180/300 day statute of limitations for filing charges. The District Court stated, without explanation, Pet. App. 16a: "The Court is not concerned that this procedure unduly limits the time in which an employee has to bring an employment discrimination claim." The Court of Appeals ignored petitioner's argument that he had complied with the statutory time limit.

Congress has extended the time for filing administrative charges to 180 days, 300 days in those states, such as South Carolina, which have state Fair Employment Practices Acts. 42 U.S.C. § 2000e - 5(e)(1), adopted for the ADA in 42 U.S.C. § 12117(a). Enforcing much shorter time limits in the grievance process clearly prevents the "vindication of rights" under employment discrimination statutes, since Congress has mandated the courts "to interpret this [statutory] time limitation so as to give the aggrieved person the maximum benefit of the law. . . ." *See Zipes v. Trans World* Airlines, 455 U.S. 385, 395 (1982); *cf. Graham Oil Co. v. ARCO Products*, 43 F.3d 1244, 1247-48 (9th Cir. 1995) (reducing time for asserting commercial claim from one year to six months, and other limitations, rendered the arbitration clause unenforceable); *Nelson v. Cyprus Baghdad Copper Co.*, 119 F.3d 756, 761 n.8 (9th Cir. 1997), *cert. denied*, ___ U.S. ___, 66 U.S.L.W. 3686 (April 20, 1998) (claim under Americans with Disabilities Act); *see also Cole v. Burns Intern. Security Services*, 105 F.3d 1465, 1482 (D.C. Cir. 1997).

This agreement does not guarantee access to impartial arbitration. As discussed above, Section II.B, this Court has consistently been concerned that the worker does not control prosecution of his grievance nor the demand for arbitration. But here the problem of access to arbitration is even more fundamental. Under the bargaining agreement, not even the worker's local union can take a claim to arbitration if the industry committee rejects the worker's claim. Arbitration is available only when the District Negotiating Committee deadlocks on the grievance. JA 44a. For claims before the Seniority Board, that Board's determination is final and binding. There is never any access to an arbitrator. JA 48a.

For statutory claims asserted against the union, or against the union and the employer jointly, the absence of a neutral decision maker is painfully obvious. All members of the joint labor-management grievance committees at the Port level and the District level represent either an employer or a union affiliated with the allegedly offending union.

For contract claims, such industry boards or committees are completely appropriate, but these boards are inadequate for statutory claims. Nothing in *Gilmer* or the *Mitsubishi* Trilogy authorizes the union to allow such boards to make a final determination on statutory claims of individual workers.

The worker cannot select counsel of his choice. As the party to the bargaining agreement, the union controls presentation of the grievance, including choosing the representative. Usually grievances are presented by union officials (local officers or District or International representatives), not by attorneys. See *McDonald v. City of West Branch*, 466 U.S. 284, 290 n.9 (1984). This would be the case under this agreement through the industry grievance committee steps, so that a worker could easily lose his claim in a final and binding denial of a grievance before any attorney ever spoke on his behalf.

Even when an attorney participates, as (s)he would if the arbitration stage were reached under the CBA, the attorney is selected, retained, and instructed by the union, not by the individual worker who has suffered discrimination.

The full range of statutory remedies is not guaranteed. In *Gilmer*, this Court assumed that arbitration could only be enforced if the arbitrator could award the full range of statutory remedies; the relevant arbitration rules did not restrict the remedies available. 500 U.S. at 32. Subsequently, in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995), this Court held that punitive damages could be awarded in securities arbitration.

As to relief to the individual, the bargaining agreement here states only, JA 45a:

> Any decision in favor of the Employee involving monetary aspects or discharge shall require the Employer involved to make financial restitution from the time of the complaint concerned. . . .

The use of the term "restitution" connotes back pay, and possibly fringe benefits, such as contributions to the Pension and Welfare Fund. These remedies "would generally be restitutionary in nature. See *Curtis v. Loether*, [415 U.S. 189], at 197 [(1974)]." *Local No. 391 v. Terry*, 494 U.S. at 572. It is doubtful, at best, whether this agreement contemplates that an arbitrator can award compensatory and/or punitive damages. Traditionally, punitive damages have been available in labor arbitration only where clearly authorized in the agreement. *See, e.g., Baltimore Regional Joint Board v. Welaster Clothes*, 596 F.2d 95, 98 (4th Cir. 1979). The ADA authorizes recovery of both compensatory and punitive damages (42 U.S.C. § 2000e-5(c), adopted by 42 U.S.C. § 12117(a)). Petitioner sought both remedies. JA 20a.

With regard to statutory claims against the union, it would be doubtful that punitive damages could be awarded in the grievance procedure or arbitration. Even in cases where the worker establishes a breach of the duty of fair representation in presenting a grievance, the worker cannot recover punitive damages. *Electrical Workers v. Foust*, 442 U.S. 42, 52 (1979).

Both industry committees and arbitrators lack competence to resolve statutory claims of employment discrimination. The labor arbitrator's lack of competence in a complex area of public law has been a significant concern for this Court in the decisions holding that statutory judicial remedies are not superseded by labor arbitration. *Alexander*, 415 U.S. 56-58; *Barrentine*, 450 U.S. at 743; and *McDonald*, 466 U.S. at 290, text at n.9. In decisions like *Gilmer*, revising this Court's view of commercial arbitration, the Court has relied on the Security and Exchange Commission's "broad authority

. . . to mandate the adoption of any rules it deems necessary to ensure that arbitration procedures adequately protect statutory rights." *Shearson / American Express, Inc. v. McMahon*, 482 U.S. 220, 233-34 (1987).

Of course, unlike *Gilmer*, there is no federal agency that establishes, monitors, or maintains standards in the labor arbitration regime. Because of the unique nature of the grievance process (see above, pages 19-21), Petitioner submits that labor arbitrators, on the whole, still lack the competence to resolve complex statutory issues applying the proper presumptions in favor of the protected person as established by federal statute and regulation. For example, the arbitration clause here declares that an arbitrator should be "a person who is knowledgeable and familiar with the problems of the Longshore industry." JA 44a. No intent is declared to select a person knowledgeable about specific public law issues relevant to statutory disputes.

But even if the competence of labor arbitrators has improved in this area, the competence of the joint industry committees and grievance boards has not. In this case, as in *Barrentine* and many other instances, the decision of such a committee or board may be final and binding both on the worker and on the union. Not only are the members of these committees *not lawyers*, compare *McDonald*, 466 U.S. at 290, n.9 (citing to *Alexander* and *Barrentine*), they may have no formal education beyond high school. Their experience in the industry prepares them well to resolve issues of the "application and interpretation of the bargaining agreement." But Committee members with limited formal education are poorly prepared to understand and apply complex statutory standards and presumptions. The increasingly complex nature of employment law makes it hazardous even for a lawyer who is an excellent general practitioner to attempt to present an employment discrimination claim without specialized assistance. If lay union representatives present claims under employment discrimination statutes to these committees, lay members of industry committees and boards cannot be expected to understand clearly any complex issues.

Procedural limitations on the grievance and arbitration process make that process inadequate for both adjudication and review of statutory claims. In *Gilmer*, this Court emphasized the procedural protections in place for commercial arbitration in the securities industry, particularly in light of the oversight role of the Securities and Exchange Commission. In rejecting Mr. Gilmer's objections to arbitration of his ADEA claims, this Court emphasized several procedural protections, including: (1) the rules authorized discovery, though on a limited basis; and (2) the rules required that arbitration awards be in writing and allow public access to awards. 500 U.S. at 31-32. Here there are no rules, and the bargaining agreement reflects no agreement to authorize discovery for the grievance process. Nor are awards required to be issued in writing. Without a written award, it is virtually impossible for the courts "to ensure that arbitrators comply with the requirements of the statute at issue."[11] *Gilmer* at 32 n.4.

Further, the bargaining agreement here reflects no intent to take testimony before the joint industry grievance committees, nor to maintain a written record of the grievance proceedings. In fact, the respective representatives usually present their cases to the industry committees without testimony. Compare the procedure described in *Local No. 391 v. Terry*, 494 U.S. 558, 562 (1990).

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[11] Some decisions in the courts of appeals reviewing arbitration awards in statutory employment claims reflect a standard for judicial review that will correct legal errors only if the arbitrator knew the statutory requirements and intentionally refused to follow them. *E.g., Montes v. Shearson Lehman Brothers, Inc.*, 128 F.3d 1456, 1461 (11th Cir. 1997). Without a written award, there is no way for a court to review whether the arbitrator violated this standard.

B. A "duty of fair representation" claim against the union is an inadequate substitute for a claim against the employer.

If a worker must meet the standard to prove "breach of duty of fair representation" (DFR) to obtain a hearing on the merits of a discrimination claim, that requirement is itself "foregoing a substantive right afforded by the statute." In a DFR case, the employee must prove "arbitrary or bad-faith conduct on the part of the Union." *Vaca v. Sipes*, 386 U.S. 171, 193 (1967). This deferential standard protecting unions from liability was adopted by this Court so that "the employer and the union . . . each will endeavor in good faith to settle grievances short of arbitration." *Id.* at 191.

These are valid objectives in administering a private contract, a bargaining agreement, but may have perverse consequences for enforcing statutes that protect individual employees from discrimination.

In addition, under prevailing interpretation of remedies, if the union has breached the duty of fair representation, the union would be solely liable for all of the worker's losses after the time the union's breach caused the losses to continue. *Bowen v. U.S. Postal Service*, 459 U.S. 212 (1983). Such a rule would greatly benefit the primary wrongdoer (the employer) who has discriminated against the worker. As in *Bowen*, the employer would be relieved of half or more of its liability for the harm it caused. This allocation of liability would reduce the beneficial effect of statutory remedies in deterring repetition of the violations.

C. Transforming the grievance process to protect statutory rights would undermine the efficiency of the mechanism in adjusting contract disputes.

In *Alexander*, this Court recognized that it might be possible, if sufficient resources were to be devoted to the project, to bring the practice of labor arbitration up to "a standard that adequately insured effectuation of Title VII rights in the arbitral forum. . . ." 415 U.S. at 59. This Court also recognized that such changes "would tend to make arbitration a procedurally complex, expensive, and time-consuming process." To match the standards approved in *Gilmer*, there would have to be at least (1) some federal agency oversight authority and mechanism; (2) some discovery procedures; (3) systematic written awards analyzing the statutory issues; and (4) a more stringent standard of judicial review to "ensure that arbitrators comply with the requirements of the statute. . . ." 500 U.S. at 31-32. Time limits for filing grievances would have to be relaxed to comply with the time limits established by Congress. The individual worker's right to counsel of his choice would have to be protected.

As observed by the Court in *Vaca v. Sipes*, 386 U.S. 171, 191-92 (1967), to give the individual worker the right to control prosecution of his grievance would increase the number of grievances taken to arbitration: "This would greatly increase the cost of the grievance machinery and could so overburden the arbitration process as to prevent it from functioning successfully."

These changes would undermine the nature of the labor grievance process as an extension of collective bargaining. To give the individual worker control sufficient to assure protection of his rights would undermine the union's authority to control presentation and resolution of grievances. Such changes would be pernicious; to avoid them, employees need to retain the option of going to court that they have had since this Court decided *Alexander*.

These problems do not arise under *Alexander*. The worker retains the right to go to court, but has the option -- with the consent of both union and management -- to submit the statutory claim to an arbitrator. Where the submission is optional, the victim of discrimination can use labor arbitration where the procedures and the representative will give him satisfactory protection of statutory rights. See *supra* pp. 13-14.

IV. No statute creates a national policy that a collective bargaining agreement should supersede the judicial remedies Congress provided to enforce the Americans with Disabilities Act and other statutes prohibiting employment discrimination.

The foregoing arguments show (1) why this labor agreement, like such agreements traditionally, was never intended to extend to statutory claims of employment discrimination; and (2) why institutional arrangements that are well suited to resolve contract grievances are inadequate to assure the protection of rights under employment discrimination statutes. Either of those points is sufficient to resolve this case. More broadly, however, Congress has never authorized a bargaining representative to waive either judicial remedies or the constitutional right to a jury trial.

The Americans with Disabilities Act explicitly provided a judicial forum for the enforcement of the ADA. 42 U.S.C. § 12117, adopting *inter alia* 42 U.S.C. § 2000e-5. In 1991, the remedies available under the ADA for intentional discrimination (as under Title VII of the Civil Rights Act of 1964) were extended to include compensatory and punitive damages and the right to a jury trial. 42 U.S.C. § 1981a(c). That right to a jury trial is grounded in the Seventh Amendment. *Hetzel v. Prince William County, Virginia*, ___ U.S. ___, 118 S. Ct. 1210 (1998).

The courts below held that the grievance-arbitration provisions of the bargaining agreements governing petitioner's hiring hall displaced all judicial remedies provided in the Americans with Disabilities Act. The Court of Appeals specifically relied upon "both the ADA's statutory preference for arbitration, 42 U.S.C. § 12212, and the strong federal policy favoring alternative dispute resolution . . . ." Pet. App. at 5a.

In fact, there are no statutory grounds for the ruling below. The ADA expresses no "preference" for mandatory pre-dispute arbitration agreements. Under *Austin*, the Federal Arbitration Act does not apply to Collective Bargaining Agreements, 78 F.3d at 879, and the respondents have not argued otherwise. Section 301 favors arbitration of contract disputes, but this court has repeatedly ruled, both before and after *Alexander*, that the federal policy favoring arbitration of collective labor disputes does not displace judicial remedies provided to individual workers.

A. Neither the ADA nor any other federal employment discrimination statute expresses a "preference" for mandatory pre-dispute arbitration agreements.

The issue presented is not whether Congress permitted voluntary post-dispute arbitration for a binding resolution of statutory claims. *Alexander* permitted such arbitration, if the employee voluntarily and knowingly relinquished his judicial remedies, and Congress has encouraged voluntary use of "alternative dispute resolution." The issue is whether Congress has authorized unions to bind workers to pre-dispute agreements for *mandatory* arbitration of statutory claims.

In *Austin*, the Fourth Circuit relied on The Civil Rights Act of 1991, § 118, to conclude that "Congress is in favor of arbitration." 78 F.3d at 881. Two years later, in *Wright*, this "favor" had progressed to a "statutory preference." But it is clear that Congress has never approved *mandatory pre-dispute arbitration agreements*, much less expressed a "statutory preference" for mandatory pre-dispute agreements.

The Fourth Circuit's analysis of Congressional intent rests on its expansive reading of § 118 of the 1991 Amendments to Title VII, a section adopted almost verbatim from § 12212 of the Americans with Disabilities Act. Those statutes provide:

> **§ 12212. Alternative means of dispute resolution**
>
> Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, fact finding, mini-trials, and arbitration, is encouraged to resolve disputes arising under this chapter.

The initial phrase of this section, drafted in 1990 and enacted in two separate Acts in 1990 and 1991, limits ADR techniques to cases "Where appropriate and to the extent authorized by law . . . ." In *Alexander* and its progeny, this Court had repeatedly held that it was neither "appropriate" nor "authorized by law" for a union to waive judicial remedies for the workers it represents. The most reasonable interpretation of the statutes enacting this language is that Congress intended to encourage only *voluntary* use of such ADR techniques.

Other provisions of The Civil Rights Act of 1991 also support the conclusion that Congress endorsed "arbitration" limited to voluntary post-dispute agreements. The Act authorized compensatory damages and punitive damages as new remedies for intentional discrimination in violation of the ADA (and Title VII). Trial of these damage remedies was to be before a jury, if demanded, a right grounded in the Seventh

Amendment. *Hetzel v. Prince William County*, ___ U.S. ___, 118 S.Ct. 1210 (1998).[12]

In the legislative history of the ADA, even before enacting damage remedies and the right to jury trials, Congress clearly stated its intention that the rule of *Alexander* should apply to allow voluntary post-dispute agreements to waive judicial remedies, but *only* post-dispute agreements.[13] The Conference Committee Report explicitly provided:

> It is the intent of the conferees that the use of these alternative dispute resolution procedures is completely voluntary. Under no condition could an arbitration clause in a collective bargaining agreement or employment contract prevent an individual from pursuing their rights under the ADA.

H.R. Conf. Rep. No. 596, 101st Cong., 2d Sess. 89 (1990), reprinted in 1990 U.S.C.C.A.N. 565, 598, cited in *Austin*, 78 F.3d at 881.

Congress' intent to preserve the rule of *Alexander* was explicitly stated in Committee Reports for both the ADA and The Civil Rights Act of 1991:

> The Committee believes that any agreement to submit disputed issues to arbitration, whether in the context of a collective bargaining agreement or in an employment contract, does not preclude the affected person from seeking relief under the enforcement provisions of this Act.

---

[12] "It would be at least a mild paradox for Congress, having in another amendment that it made to Title VII [and the ADA] in 1991 confirmed a right to trial by jury for the first time . . . to have empowered unions in those same amendments to prevent workers from obtaining jury trials in these cases." *Pryner v. Tractor Supply Co.*, 109 F.3d at 363.

[13] See *Nelson v. Cyprus Baghdad Copper Corp.*, 119 F.3d 756, 761-62 (9th Cir. 1997), *cert. denied*, ___ U.S. ___, 66 U.S.L.W. 3679 (April 20, 1998), holding that a waiver of judicial remedies by an individual employee has to be "knowing."

H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 3 at 76-77 (1990). See also, H.R. Rep. No. 40(I), 102d Cong., 1st Sess., 97 (1991), reprinted in 1991 U.S.C.C.A.N. 549, 635. ("This view is consistent with the Supreme Court's interpretation of Title VII in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). The Committee does not intend this section to be used to preclude rights and remedies that would otherwise be available."), quoted in part in *Austin*, 78 F.3d at 881-82.

B. The Federal Arbitration Act does not apply to these collective bargaining agreements.

The Federal Arbitration Act (F.A.A.), upon which this Court relied in *Gilmer*, is inapplicable to the collective bargaining agreements involved in this case.

Section 1 of the Act, 9 U.S.C. § 1, provides that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce . . . ." Although in *Gilmer* this Court reserved decision on the issue whether that statutory exclusion applied to *"all* 'contracts of employment,'" 500 U.S. at 25-26 n.2, that issue is not presented here[14]: respondents have not argued at any stage of this case that the F.A.A. applies to the agreements, and the court below did not cite the F.A.A. in support of its ruling.

---

[14] Settled precedent in the Fourth Circuit has established that the F.A.A. has no application to any collective bargaining agreement, *Domino Sugar Corp. v. Sugar Workers Local Union 392*, 10 F.3d 1064, 1067 (4th Cir. 1993); *Sine v. Local No. 992, Intern. Broth.*, 644 F.2d 997, 1002 (4th Cir. 1981); *United Electrical, etc., Workers v. Miller Metal Products*, 215 F.2d 221, 224 (4th Cir. 1954). The court of appeals adhered to those precedents in *Austin*, 78 F.3d at 879, and 882-83 n.2.

In any event, it is undisputed in this case that petitioner worked in the longshore industry, physically moving goods in interstate and foreign commerce. It is therefore clear as a matter of statutory construction that the collective bargaining agreements here involved are within the exclusion in § 1 of the F.A.A. *See, e.g.*, *Pryner v. Tractor Supply Co.*, 109 F.3d at 357; *Cole v. Burns Int'l Security Services*, 105 F.3d 1465, 1469 (D.C. Cir. 1997). Consequently, neither the F.A.A. nor *Gilmer* (which relied upon the F.A.A.) provide support in this case for the decision of the court below.

C. Section 301 of the National Labor Relations Act provides no authority for a union to bind workers it represents to grieve and arbitrate statutory claims.

This Court has declared Section 301, 29 U.S.C. § 185, to be a vehicle for establishing uniform construction of bargaining agreements throughout the nation. The Court's jurisprudence on arbitration under Section 301 has centered on applying the bargaining agreement through a regime of industrial self-government that is created in return for the union's relinquishing the right to strike. Since the beginning, the focus has been virtually exclusively on a uniform system for construing the agreement, and this Court has repeatedly found that Section 301 (and comparable provisions of the RLA) do *not* pre-empt judicial remedies under federal statutes.

Even before this Court's decision in *Alexander*, the Court had found that Section 301 did not require arbitration of a seaman's statutory claim for wages and penalties under 46 U.S.C. §§ 596-597. *U.S. Bulk Carriers v. Arguelles*, 400 U.S. 351, 357 (1971). In *Alexander*, this Court again expressly held that an arbitrator's decision under the bargaining agreement, enforceable under Section 301, was not dispositive of a statutory claim. *See, e.g.*, 415 U.S. at 46 n.6. Instead, this Court unanimously held, 415 U.S. at 59-60:

> . . . that the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance arbitration clause of a collective bargaining agreement and his cause of action under Title VII.

In *Barrentine*, this Court held that statutory claims under the Fair Labor Standards Act were not resolved by submission of wage claims to a joint industry committee under a bargaining agreement requiring "that 'any controversy' between the parties to the agreement be resolved through the binding contractual grievance procedures." *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728, 736-37 (1981). This Court expressly considered the arguments based on Section 301, 450 U.S. at 734-37, and held that Congress intended that the judicial forum be available for enforcing statutory wage claims, even after the grievance process had reached a binding result on the same claims under the contract.

More recently, in *Gilmer* this Court expressly distinguished the *Alexander* line of cases as *"not* decided under the FAA, which, as discussed above, reflects a 'liberal federal policy favoring arbitration agreements.'" [Emphasis added.] 500 U.S. at 35. That this Court meant to adhere to its prior holding that Section 301 does not require arbitration of federal statutory claims was again confirmed in *Livadas v. Bradshaw*, 512 U.S. 107, 127 n.21 (1994), where this Court cited the *Alexander* cases with approval in addressing limits on the scope of pre-emption of state statutory claims by Section 301.

Indeed, *Livadas v. Bradshaw* clearly shows that the scope of the authority to require arbitration under Section 301 is much narrower than the authority under the Federal Arbitration Act. In *Livadas*, this Court held that Section 301 *does not* pre-empt all claims under § 229 of the California Labor

Code when there is an arbitration provision in the applicable collective bargaining agreement. But in *Perry v. Thomas*, 482 U.S. 483, 492 (1987), this Court held that, under the Federal Arbitration Act, the arbitration provision in an applicable securities registration *does* pre-empt all claims under the same § 229 of the California Labor Code.

Livadas is simply one of a long line of cases in which this Court has held that state law claims are *not* pre-empted by Section 301 unless the determination of the claim requires a construction of doubtful matters covered by the bargaining agreement. See, e.g., *Lingle v. Norge Division of Magic Chef*, 486 U.S. 399 (1988) (state law claim for retaliatory discharge for filing workers compensation claim). As *Livadas* noted, 512 U.S. at 125, this Court has repeatedly held that the union's intent for an arbitration agreement to waive the rights of an individual to a state judicial forum would have to be "clear and unmistakeable." Petitioner's counsel have not found a single case where this Court has ever found an agreement to arbitrate to be a "clear and unmistakeable" waiver of a state law claim.

Similarly, under the Railway Labor Act, this Court has held that the grievance-arbitration process and the National Adjustment Board do not pre-empt federal statutory claims, *Atchison, Topeka & S.F.R. Co. v. Buell*, 480 U.S. 557 (1987) (FELA claims), nor does the mere existence of those RLA remedial procedures pre-empt state law statutory claims. *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246 (1994).

Simply put, this Court has never found the judicial remedies Congress created for an individual worker's statutory claim to be foreclosed by a grievance-arbitration procedure that was enforceable under Section 301. The Fourth Circuit's application of the "national policy favoring arbitration of labor disputes" is both unprecedented and unsound. It is one thing for the courts to resolve apparent conflicts in the requirements of the FAA with rights under other federal statutes. It is something

wholly different to abrogate judicial remedies enacted by Congress with a nebulous "national policy favoring arbitration" which has no basis in any applicable federal statute.

D. The "voluntary and knowing" waiver required by *Alexander v. Gardner-Denver Co.* must necessarily be an individual choice, which cannot be delegated to a union.

As observed in *Barrentine*, Congress has enacted many standards for the protection of workers. These minimum standards of substantive rights cannot be waived prospectively by the worker, nor can such rights be negotiated away by a representative. *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728 (1981). To allow such prospective waivers would completely undermine the public policy reflected by each statute, including the statute at issue here, the Americans with Disabilities Act.

With regard to statutory rights protected by Title VII, this Court emphasized in *Alexander*, 415 U.S. at 51:

> . . . that there can be no prospective waiver of an employee's rights under Title VII. . . . Title VII . . . concerns not majoritarian processes, but an *individual's* right to equal employment opportunities. Title VII's strictures are absolute and represent a congressional command that *each employee* be free from discriminatory practices. Of necessity, the rights conferred can form no part of the collective-bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII. [Emphasis added.]

The rights conferred under each of the numerous anti-discrimination statutes regulating employment are *personal* rights, not collective rights. *Compare Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995) (right to equal protection is a personal right). Personal rights can only be waived personally, not through a collective representative. Even some rights supporting collective activity under the NLRA may not be waived by a collective representative. *See NLRB v. Magnavox Company*.

In *Alexander*, this Court also discussed a post-dispute waiver of rights under Title VII. This Court observed that, to enforce "any such [post-dispute] waiver, a court would have to determine at the outset that the employee's consent to the settlement was voluntary and knowing." 415 U.S. at 52 n.15. This is the appropriate standard to apply to any waiver of rights under employment discrimination statutes, including a pre-dispute waiver of a judicial forum (in those instances where Congress intended to allow such waivers).

The "voluntary and knowing" standard is reflected in the legislative history of the ADA and of The Civil Rights Act of 1991.[15] The "voluntary and knowing" standard is particularly appropriate because the judicial remedies now include a Seventh Amendment constitutional right to a jury trial. *Hetzel v. Prince William County, Virginia*, ___ U.S. ___, 118 S. Ct. 1210 (1998). "[A]ny seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Local No. 391 v. Terry*, 494 U.S. at 565.

CONCLUSION

This Court's decision in *Alexander v. Gardner-Denver Co.* was a correct limitation of the scope of a union's authority and duties. Minimum substantive rights guaranteed to individuals by federal statutes are not the responsibility of the union and the union has no authority to compromise any aspect of those statutory rights. The union here certainly did not agree to compromise those rights, nor to commit the statutory claims of individuals to final and binding resolution in the grievance-arbitration process.

Since 1985, the Court's decisions in the *Mitsubishi* Trilogy approve resolution of statutory claims in commercial arbitration, but these decisions have no application to the grievance-arbitration mechanisms in labor agreements. These procedures in labor agreements still administer an ongoing process of interpretation and application of the private "law of the shop." Commercial arbitration substitutes for litigation when the commercial relation has broken down; labor arbitration addresses the vital rights and obligations in the continuing relation between the parties in order to avoid the disruption of relations that occurs in a strike.

Further, because the labor grievance process is so important to administering the ongoing relations between union and management, the process is not designed to meet the standards by which commercial arbitration can adequately vindicate rights under the statute. Transforming the grievance process to give reasonable assurance that statutory rights would be protected would undermine the usefulness of the grievance process as an extension of collective bargaining.

This case involves a grievance process that is clearly not adequate to vindicate statutory rights, particularly because "grievances" must be asserted within 48 hours, rather than the 180/300 days Congress provided to assert ADA claims. There are many other variations in bargaining agreements, but they all share a central characteristic: they are designed as an extension of collective bargaining, as a substitute for the strike, not as a substitute for litigation. *Alexander*'s "bright-line" rule, that individual statutory claims may be enforced in court, has well served the business community, employees, and the judiciary.

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[15] *Prudential Insurance Co. of America v. Lai*, 42 F.3d 1299, 1304-5 (9th Cir. 1994) (Title VII); *Nelson v. Cyprus Baghdad Copper Corp.*, 119 F.3d 756, 761 n. 9-10 (9th Cir. 1997) (ADA), *cert. denied*, ___ U.S. ___, 66 U.S.L.W. 3679 (April 20, 1998).

This Court should reaffirm *Alexander* and reverse the judgment below.

Respectfully submitted,

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◆

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CEASAR WRIGHT,

Petitioner,

vs.

UNIVERSAL MARITIME SERVICE CORP, *et al.*,

Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Fourth Circuit

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TABLE OF CONTENTS

Page

Table of Citations ii

Respondents' Statement of the Case 1

Summary of Argument 1

I. Clarifying The Facts 3

II. Clarifying The Issue 5

III. *Alexander* — A Retrospective View 8

A. There Is No Distinction Between the FAA and the LMRA as to Federal Policy. 12

1. Arbitration is the favored procedure for resolving labor disputes — including "individual" and "statutory" claims. 13

2. Deferral to arbitration — two concepts sharing a single name. 15

3. *Hammontree* — reconciling *Alexander* with national labor policy. 17

B. There Is No "Tension" Here Between Collective Representation and Individual Rights. 21

1. Unfair representation cannot be presumed. 21

Page

2. Wright could have pressed his own grievance. 23

3. The employer cannot negotiate agreements with bargaining unit employees. 25

C. Agreements to Arbitrate Statutory Claims. . 26

IV. Resolving the Conflict 29

A. *Austin* 30

B. *Austin* Applied and Rejected. 31

V. Petitioner Has Failed to Prove a Legislative Intent to Preclude Arbitration 40

VI. "Waiver" — Not of Rights, But of Forum. 46

Conclusion 48

TABLE OF CITATIONS

Cases Cited:

Abendschein v. Montgomery County, 984 F. Supp. 356 (D. Md. 1997) 38

Adams v. Philip Morris, Inc., 67 F.3d 580 (6th Cir. 1996) 43

Page

Air Line Pilots Ass'n v. Miller, __ U.S. __, 118 S. Ct. 1761, 140 L. Ed. 2d 1070, 66 U.S.L.W. 4416 (May 26, 1998) 48

Albertson's, Inc. v. United Food & Commercial Workers, 1997 U.S. Dist. Lexis 4554 (D. Ida. Mar. 10, 1997) 37

Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) . . . . *passim*

Allied – Bruce Terminix Co. v. Dobson, 513 U.S. 265 (1995) 8

Allis-Chalmers Mfg. Co. v. Lueck, 471 U.S. 202 (1985) 14

Almonte v. Coca-Cola Bottling Co., 959 F. Supp. 569 (D. Conn. 1997) 32

America Tobacco Co. v. Patterson, 456 U.S. 63 (1982) 22

Araiza v. National Steel & Ship Bldg. Co., 973 F. Supp. 963 (S.D. Cal. 1997) 38

AT&T Technologies v. Communications Workers of America, 475 U.S. 643 (1986) 4, 14, 15

Austin v. Owens – Brockway Glass Container, Inc., 78 F.3d 875 (4th Cir.), *cert. denied*, __ U.S. __, 117 S. Ct. 432, 136 L. Ed. 2d 330 (1996) . . . .*passim*

Page

Baert v. Euclid Beverage, Ltd., 954 F. Supp. 170 (N.D. Ill. 1997) 32

Baker v. Kaiser Aluminum & Chemical Corp., 951 F. Supp. 953 (E.D. Wash. 1996) 32

Barrentine v. Arkansas – Best Freight System, Inc., 450 U.S. 728 (1981) 1, 11, 15, 18, 20, 21, 26, 28, 29, 43

Bintner v. Burlington Northern 857 F. Supp. 1484 (D. Wyo. 1994) 36

Boys Markets v. Retail Clerks Union Local 770, 398 U.S. 235 (1970) 14

Breech v. Alabama Power Co., 962 F. Supp. 1447 (S.D. Ala. 1997), *aff'd mem.*, 140 F.3d 1043 (11th Cir. 1998) 39

Bright v. Norshipco., 951 F. Supp. 95 (E.D. Va. 1997) *aff'd mem.*, 133 F.3d 913 (4th Cir. 1998) 32

Brisentine v. Stone & Webster Engineering Corp., 117 F.3d 519 (11th Cir. 1997) 37

Brown v. ABF Freight Syst., Inc., 1997 U.S. Dist. Lexis 22105 (E.D. Va. Apr. 21, 1997), *reconsideration denied*, 158 L.R.R.M. 2050 (1998) 32

Brown v. Trans World Airlines, 127 F.3d 337 (4th Cir. 1997) 37, 48

Page

Brummett v. Copaz Packing Corp., 954 F. Supp. 160 (S.D. Ohio 1996); *remanded*, __ F.3d __, 1998 U.S. App. Lexis 2144 (6th Cir. Feb. 11, 1998) 32

Buckley v. Gallo Sales Co., 949 F. Supp. 737 (N.D. Cal. 1996) 38

Bush v. Carrier Air Conditioning, 940 F. Supp 1040 (E.D. Tex. 1996) 37, 38, 39

Bynes v. Ahrenkiel Ship Mgmt. (U.S.), Inc., 944 F. Supp. 485 (W.D. La. 1996) 37, 38

Carey v. Westinghouse Elec. Corp., 375 U.S. 261 (1964) 16

Chenowith v. Asplundh Tree Expert Co., 928 F. Supp. 605 (D. Md. 1996) 32

Chevron U.S.A., Inc. v. National Resources Defense Council, 467 U.S. 837 (1984) 18, 20

Childs v. Meadowlands Basketball Assoc., 954 F. Supp. 994 (D. N.J. 1997) 33

Chopra v. Display Producers, Inc., 980 F. Supp. 714 (S.D.N.Y. 1997) 38

Cole v. Burns Int'l Security Servs., 105 F.3d 1465 (D.C. Cir. 1997) 33, 49

Contents

Page

Coleman v. Houston Lighting & Power Co., 984 F. Supp. 576 (S.D. Tex. 1997) 37, 38

Collyer Insulated Wire, 192 N.L.R.B. 837 (1971) 15, 16, 17

Connors v. Amisub Inc., 5 AD Cas. 961 (S.D. Fla. 1996) 31

Consolidated Freightways Corp., 288 N.L.R.B. 1252 (1988) 17, 20

Cosely v. E.I. DuPont de Nemours & Co., 1997 U.S. Dist. Lexis 22509 (E.D. Va. July 24, 1997), *aff'd mem.*, 139 F.3d 888 (4th Cir. 1998) 37

D.A. Schulte, Inc. v. Gangi, 328 U.S. 108 (1946) 43

Dalton v. Jefferson Smurfit Corp., 979 F. Supp. 1187 (S.D. Ohio 1997) 38

Davis v. Houston Lighting & Power, 990 F. Supp. 515 (S.D. Tex. 1998) 38

DeGaetano v. Smith Barney, Inc., 983 F. Supp. 459 (S.D.N.Y. 1997) 7

Del Casal v. Eastern Airlines, 465 F. Supp. 1254 (S.D. Fla. 1979), *aff'd*, 634 F.2d 295 (5th Cir. 1981) 5, 6

Dowd Box Co. v. Courtney, 368 U.S. 502 (1962) 13

Contents

Page

Duffield v. Robertson Stephens & Co., __ F.3d __, 76 FEP Cas. 1450 (9th Cir. 1998) 7, 41, 42, 43, 44

East Texas Motor Freight Syst. v. Rodriguez, 431 U.S. 395 (1977) 22

EEOC v. Frank's Nursery & Crafts, Inc., 966 F. Supp. 500 (E.D. Mich. 1997) 31, 32, 45

Emporium Capwell v. Western Addition Community Org., 420 U.S. 50 (1975) 24

First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995) 4

Friedman v. Metropolitan Life Ins. Co., 1996 U.S. Dist. Lexis 19889 (S.D.N.Y. June 19, 1996) 31

Gateway Coal Co. v. United Mine Workers of America, 414 U.S. 368 (1974) 13, 14

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) . . . . *passim*

Gingles v. Bethlehem Steel Corp., __ F.3d __ (4th Cir. Apr. 22, 1998) 32

Glickstein v. Neshaminy Sch. Dist., 156 L.R.R.M. 2706, 72 EPD ¶45,126 (E.D. Pa. 1997) 37, 38

Glover v. St. Louis – San Francisco Ry., 393 U.S. 324 (1969) 23

Page

Gray v. Toshiba American Consumer Prods., Inc., 959 F. Supp. 805 (M.D. Tenn. 1997) 39

Greenwood v. United States, 350 U.S. 366 (1956) 45

Hammontree v. NLRB, 925 F.2d 1486 (D.C. Cir. 1991) 15, 17, 18, 19, 20

Hampton v. Kroger Co., 1996 U.S. Dist. Lexis 14407 (W.D. Va., Sept. 27, 1996) 32

Harrison v. Eddy Potash, Inc., 112 F.3d 1437 (10th Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3137 (Aug. 6, 1997) 36, 37

Henry v. Colonial Baking Co., 952 F. Supp. 744 (M.D. Ala. 1996) 32

Hill v. American Can Co., 952 F. Supp. 398 (N.D. Tex. 1996) 38

Hines v. Anchor Motor Freight, 424 U.S. 554 (1976) 23, 25

Hooters of America, Inc. v. Phillips, 76 FEP Cas. 1757 (D.S.C. Mar. 12, 1998) 45

Humphrey v. Kroger Co., 154 L.R.R.M. 3086, 7 A.D. Cas. 383 (E.D. Tenn. 1997) 32

Page

International Union of Electrical, Radio & Machine Workers v. Robbins & Myers, Inc., 429 U.S. 229 (1976) 21

Iowa Beef Packers, Inc. v. Thompson, 405 U.S. 228 (1972) 27, 43

Jessie v. Carter Health Care Center, Inc., 930 F. Supp. 1174 (E.D. Ky. 1996) 32

J.I. Case v. NLRB, 321 U.S. 332 (1944) 25

John Wiley & Sons v. Livingston, 376 U.S. 543 (1964) 14

Johnson v. Bodine Elec. Co., __ F.3d __, 157 L.R.R.M. 2897, 76 FEP Cas. 744 (7th Cir. 1998) 39

Johnson v. Hubbard Broadcasting, Inc., 73 FEP Cas. 8 (D. Minn. 1996) 48

Johnson v. Railway Express Agency, 421 U.S. 454 (1975) 21

Kiernan v. Piper Jaffray Cos., 137 F.3d 588 (8th Cir. 1998) 45

Kirkendall v. United Parcel Serv., Inc., 964 F. Supp. 106 (W.D.N.Y. 1997) 39

Krahel v. Owens – Brockway Glass Container, Inc., 971 F. Supp. 440 (D. Ore. 1997) 33, 38, 45

Page

LaChance v. Northeast Publishing, Inc., 965 F. Supp. 177 (D. Mass. 1997) 37, 45

Livadas v. Bradshaw, [512] U.S. [107, 127], 109 F.3d 354, *cert. denied*, __ U.S. __, 118 S. Ct. 294, 139 L. Ed. 2d 227 (1997). 33, 34, 35

Loftis v. Brown & Williamson Tobacco Corp., 73 FEP Cas. 1754 (M.D. N.C. 1997) 37

Longshoremen (ILA) Local 367 (*Galveston Maritime Ass'n*), 148 N.L.R.B. 897 (1964), *enf'd*, 368 F.2d 1010 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967) 22

Lynch v. Pathmark Supermarkets, 987 F. Supp. 236 (S.D.N.Y. 1997) 37, 39

Mago v. Shearson Lehman Hutton, Inc., 956 F.2d 932 (9th Cir. 1992) 41

Martin v. Dana Corp., 150 L.R.R.M. 2117 (E.D. Pa. 1994), *aff'd*, 155 L.R.R.M. 2523, 73 FEP Cas. 1803, 134 Lab. Cas. ¶10,015 (3d Cir.), *withdrawn*, 114 F.3d 421, *vac. mem.*, 124 F.3d 590, *reversed mem. on panel rehearing*, 135 F.3d 765 (1997) 38

McCrea v. Drs. Copeland, Hyman & Schackman, P.A., 945 F. Supp. 879 (D. Md. 1996) 31

McDonald v. West Branch, 466 U.S. 284 (1984) 1, 11, 15, 18, 20, 21, 26, 28, 29

Page

Mellody v. Upper Merion Area Sch. Dist., 157 L.R.R.M. 2401 (E.D. Pa. 1998) 39

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) 8, 11, 46

Moise & Son Trucking, 197 N.L.R.B. 198 (1972) 25

Moore v. Duke Power Co., 971 F. Supp. 978 (W.D. N.C. 1997) 32

Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1 (1983) 8

Motor Freight Syst. v. Rodriguez, 431 U.S. 395 (1977) 22

Nalichowski v. Capshaw, 1996 U.S. Dist. Lexis 14031 (E.D. Pa. Sept. 20, 1996) 33

Nghiem v. NEC Electronic, Inc., 25 F.3d 1437 (9th Cir.), *cert. denied*, 513 U.S. 1044 (1994) 41

Nichols v. General Motors Co., 978 F. Supp. 743 (S.D. Ohio 1997) 37

Nieves v. Individualized Shirts, 961 F. Supp. 782 (D. N.J. 1997) 39

NLRB v. Insurance Agents, 361 U.S. 477 (1960) 25

Page

Nolde Bros v. Bakery & Confectionery Workers, Local 358, 430 U.S. 243 (1977) 14

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Page

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Page

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Page

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Page

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Page

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Page

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APPENDIX

Appendix A — Relevant Statutes 1a

RESPONDENTS' STATEMENT OF THE CASE

Petitioner's Brief contains a Statement of the Case which is, for the most part, unexceptionable. The physician's opinion recited in the first full paragraph on page 3 of the Brief was not presented to the employers until well after litigation had commenced, well more than a year after the purported "resorption" of the "bony spike." It is not true that "a grievance under the Bargaining Agreement was 'out of time'. . . [b]y the time petitioner located counsel." [Pet. Br. 4.] Petitioner's "offer to arbitrate" [Pet. Br. 4] was conditioned on a nonbinding result [J.A. 582, omitted Ex.7], for which reason the Respondents declined the offer. [J.A. 582, omitted Ex. 8] With these corrections, the Petitioner's version of the facts and the proceedings below, as set out in pp. 2-10 of his Brief, is essentially accurate.

SUMMARY OF ARGUMENT

At the inception of this case, Petitioner's union, acting as his representative, addressed the issues pertinent to Wright's attempted return to work as arising under the contractual provisions governing "qualification" to work. Although the union apparently suggested to Wright that he retain counsel, at no point did it refuse to pursue his grievance or otherwise reject his claims. When Wright chose to restrict his attention to his discrimination charges, he — not his union — abandoned the collectively bargained grievance procedure.

This Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), while generally holding that arbitration as a choice of forum for "statutory" employment discrimination claims could be required by pre-dispute agreements, identified but found it unnecessary to address three distinctions between the facts in *Gilmer* and those presented seventeen years before in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974): (1) *Alexander*, as well as the later decisions in *Barrentine v. Arkansas – Best Freight System, Inc.*, 450 U.S. 728 (1981), and *McDonald v. West Branch*, 466 U.S. 284 (1984), construed the effect of adverse pre-litigation arbitration awards upon a grievant's ability to present his statutory discrimination claims in court, whereas *Gilmer* dealt with the grievant's failure to pursue arbitration through the contractually-established procedure. (2) The existence of a collective-bargaining representative in *Alexander*, who would represent the grievant in the dispute resolution process, was deemed to create a possibility of a "tension" between individual and collective interests. (3) *Alexander* arose under the Labor-Management Relations Act, while *Gilmer*'s arbitration procedures were based on the Federal Arbitration Act.

None of these three concerns serves in any manner to require a different result in this case than that which obtained in *Gilmer*. Wright should have exhausted the grievance-and-arbitration procedures before resorting to litigation in federal court. Federal labor policy favors arbitrated resolution; the issue to be presented to the arbitrator was contractually required to conform to federal laws such as the Americans with Disabilities Act; Wright has shown no basis upon which it could be claimed that his union would not be able and willing to represent him fairly and fully; and Wright could, had he so desired, have prosecuted his grievance even without the assistance of his Local.

While the facts presented in this case do not fall neatly into a "conflict among the circuits" model, it is clear that the language of the two applicable statutes, Section 513 of the Americans with Disabilities Act and Section 118 of the Civil Rights Act of 1991, "encourage" arbitration of statutory discrimination claims, and neither Wright nor his supporting *amici* have borne their burden of proving a congressional intent to preclude arbitration.

Finally, *Gilmer* disposes of arguments regarding the "knowing and intelligent waiver" of statutory claims by explaining that no "rights" are lost; the contractual choice of forum effected by an agreement to arbitrate statutory discrimination claims remains subject oversight by the federal courts to ensure that the underlying purposes of laws prohibiting discrimination are protected.

There is no reason that this Nation's workforce should be artificially divided into two groups, one of which can be required by agreement to arbitrate statutory claims, while the other is free to ignore such contractual obligations. *Alexander*'s legacy has fulfilled

the need which created it, and its limitations on the use of arbitration under collectively-bargained agreements should be updated and redefined.

I. CLARIFYING THE FACTS

While, as noted above, there are only a few factual representations in Petitioner's Brief which warrant correction, it is critical to an understanding of this case to be aware that the facts do not fit squarely within the framework of a "conflict among the circuits." The National Academy of Arbitrators is accurate in its observation that "the *Austin-Pryner* conflict" — that is, the division between *Austin v. Owens – Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir.), *cert. denied*, __ U.S. __, 117 S. Ct. 432, 136 L. Ed. 2d 330 (1996), and such decisions as *Pryner v. Tractor Supply Co.*, 109 F.3d 354 (7th Cir.), *cert. denied*, __ U.S. __, 118 S. Ct. 294, 139 L. Ed. 2d 227 (1997)[1] — is not squarely apposite to the facts of this case. As the NAA explains it,

> These cases, unlike *Gilmer*, did arise under Section 301 and did involve collective bargaining rather than commercial agreements. But the issue in these cases was whether a non-discrimination clause in a collective bargaining agreement should be read as incorporating into the agreement the federal law prohibiting discrimination. . . .

(Brief of National Academy of Arbitrators as Amicus Curiae, p. 7).

However, the NAA's analysis of that distinction will not withstand scrutiny. The NAA agrees that "[t]he agreement in this case is atypical" because it lacks an "explicit limitation in the arbitration provision" which would confine the arbitrator "only to interpret and apply the provisions of the collective bargaining agreement," simply stating that " 'matters under dispute' which are not settled in the grievance procedure are to be submitted to arbitration." (NAA Br. at 8, 9 *quoting* J.A. 432.) Notwithstanding these indisputable facts, the NAA posits that the lack of a nondiscrimination clause in the collective bargaining agreement and of specific reference to the ADA renders the decision below "breathtaking" and reversible.

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[1] The so-called "*Pryner* line" of decisions includes opinions written after *Austin* but before *Pryner*, and generally encompasses all appellate decisions which have rejected the rationale of *Austin* for any reason. These cases are listed, along with district court decisions adopting the same views, *infra* at p. 31 *ff*.

If the NAA's agreement were correct, the writ of certiorari was improvidently granted, and the issue framed by the Petitioner is not before this Court after all. Instead, the NAA would have us ignore *Alexander*[2] to answer the question,

> Does the particular collective bargaining agreement authorize an arbitrator to interpret and apply the public law that the employee seeks to enforce and authorize the arbitrator to provide the remedies provided in the statute?

(NAA Br., pp. 12-13.)

How is this remarkable proposition derived? There is no citation supporting the question, although one may infer that the NAA believes *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), points in that direction. The NAA concedes that its argument is a "paraphrase" of *First Options*[3] (NAA Br. at 15); however, the paraphrasing is employed to erect a structure on a foundation of supposition and conjecture regarding the genesis of collective bargaining agreement language and the assumption that Wright's claim is dead "because the time for filing a grievance has

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[2] "[W]e do not believe that *Gardner-Denver* is the dispositive case." (NAA Br., p. 12).

[3] *First Options* actually holds that if the parties have agreed that an arbitrator, rather than a court, is to determine the question of arbitrability, that bargain must be kept and the courts may not interfere: "Courts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." *First Options*, 514 U.S. at 943, *quoting AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 649 (1986), *and citing United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 583 n.7 (1960).

expired." (*See* NAA Br., pp. 9 (presuming that Wright's workers' compensation claim was filed under the South Carolina Workers' Compensation Act rather than the Longshore and Harbor Workers Compensation Act), 9-10 (speculation about hypothetical issues of timeliness of filing a charge when no such issue exists), 10 ("both parties . . . adopted their agreement in light of *Gardner-Denver*").) The NAA would have this Court "declare that, in suits brought by employees to enforce statutory protections, collective bargaining agreements should not be found to require arbitration of such claims unless they clearly and explicitly so provide." (NAA Brief, p. 15.)[4] But that is not the question before the Court, and an answer to the NAA's query should await a case which presents such issue squarely.

II. CLARIFYING THE ISSUE

One amicus brief presents heated arguments for the proposition that *Gilmer* was wrongly decided, also urging this Court to consider such irrelevant "facts" as the "exorbitant costs to an employee" to vindicate rights through arbitration.[5] (Brief Amicus Curiae of

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[4] The NAA rather grudgingly concedes that it also opposes "mandatory arbitration" of *any* discrimination claim "when it requires waiver of direct access to a judicial forum." (NAA Br. at p. 6, n.8.) The author of that brief also published a post-*Gilmer* article contending that labor arbitrators are not competent to apply external law. Feller, "*Arbitration and External Law Revisited*," 37 St. Louis U.L. Rev. 973, 980 (1993). The NAA's position echoes that set out in Comment, "*Arbitrating Statutory Rights in the Union Setting: Breaking the Collective Interest Problem Without Damaging Labor Relations*," 65 U. Chi. L. Rev. 225 (1998) (arguing that both *Austin* and *Pryner* were wrongly decided). It is clear, however, that ADA issues, for example, are arbitrated in significant proportions. *See e.g.*, Terrill, "*The Americans with Disabilities Act and Labor Arbitration: Recent Awards*," 48 Lab. L.J. 3 (1997).

[5] An employee who pursues a grievance under a collective bargaining agreement incurs no costs; his labor organization represents him and provides counsel, if any, at no expense to the grievant. *See* J.A. 44a (I.L.A. and "Port Employers" each bear their respective costs, while arbitrator's fees and those of "any expert witness required by the arbitrator are to be borne jointly by the management and the Union of the port concerned.") *And cf.*, *Del Casal*

(Cont'd)

National Employment Lawyers Ass'n, *et al.* , pp. 3-28.)[6] Another seeks guidance regarding post-arbitration standards which courts should employ once exhaustion of the grievance-and-arbitration procedure has been completed. (Brief Amicus Curiae of Lawyers' Committee for Civil Rights Under Law and AARP, pp. 9-25). The AFL-CIO, Wright's own union, and his union local contend, in effect, that a union should be free to ignore the bargaining unit employees' rights to be free from discrimination, even arguing that "the union's representational authority does not extend [as] far" as to

> enter into a collective bargaining agreement which expressly provides for adjudication of statutory rights, and which expressly permits individual employee access to and control of that process.

(Brief Amici Curiae of AFL-CIO, ILA, and ILA Local 1422, p. 30, n.8.) The Attorneys General of fifteen states, while donning the clothing of "opposition to enforcement of mandatory arbitration clauses contained in collective bargaining agreements" (Brief Amici Curiae of Commonwealth of Massachusetts , *et al.*, p. 1), actually attack *any* procedure which limits the "good public policy" of making "a judicial forum available for vindication of important statutory rights under various statutes that govern the employment relationship" (*op.*

(Cont'd)
v. Eastern Airlines, 465 F. Supp. 1254 (S.D. Fla. 1979), *aff'd*, 634 F.2d 295 (5th Cir. 1981) (Railway Labor Act: refusal to provide attorney because grievant was not a union member constituted unfair representation but arbitration award was binding because grievant was represented at the hearing by personal attorney). *Compare, Shankle v. B.G. Maintenance Management of Colorado, Inc.*, 74 FEP Cas. 94, 70 EPD ¶ 44,737 (D. Colo. 1997) (agreement requiring individual employee to bear one-half of arbitration costs is unenforceable).

[6] This same spurious "cost" argument is raised by the Lawyers Committee for Civil Rights, Under Law and the AARP in their Brief at pp. 16-17.

cit., p. 8), a posture which mounts a wholesale assault on *Gilmer* itself.[7]

The United States and the Equal Employment Opportunity Commission raise all the contentions used by EEOC in support of its position that arbitration of statutory disputes should not be permitted (*see* EEOC "Notice," "Mandatory Arbitration of Employment Discrimination Disputes as a Condition of Employment," July 10, 1997, BNA Fair Emp. Prac. Manual 405:7511, *discussed in Duffield v. Robertson Stephens & Co.*, __ F.3d __, __, 76 FEP Cas. 1450, 1456 (9th Cir. 1998 *and in DeGaetano v. Smith Barney, Inc.*, 983 F. Supp. 459, 469 (S.D.N.Y. 1997)), but carefully skirt the fact that those arguments also are applicable to arbitration under the Federal Arbitration Act and, therefore, to *Gilmer*. And the ACLU's emphasis on "knowing and voluntary waiver" is yet another criticism of the *Gilmer* rationale. (Brief Amicus Curiae of American Civil Liberties Union and the ACLU of South Carolina, pp. 7-9, positing that "with the partial exception of the Ninth Circuit, the lower courts have consistently failed to test purported arbitration agreements against" the "well-established standard" of "knowing, intelligent, and voluntary . . . waivers of the right to a judicial forum for individual statutory employment discrimination claims.")

None of these arguments is pertinent to the issue presented here, which Petitioner describes as whether "a general arbitration clause in a collective bargaining contract bars an employee covered by the contract from filing his own lawsuit under a federal anti-discrimination statute." (Petitioner's Brief, p. *i*; *and see*, Petition for Writ of Certiorari, p. *i*.) Actually, that is not the issue either. Under the facts of this case, the question for resolution by this Court is whether an employee whose union has negotiated a collective bargaining agreement with an employer must pursue his remedies under the grievance-and-arbitration procedure of that agreement before resorting to litigation over an issue which is well within the ambit of questions capable of submission to arbitration. The question for the arbitrator would have been whether Wright was "qualified" to return to work — a question which was contractually required to be answered by reference to statutory standards. The arbitrator would, therefore, have resolved the question of Wright's "qualifications" in such a way as to comport with the requirements of the Americans with Disabilities Act.

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[7] One can only wonder whether these states' interest in allowing their citizens access to the courts extends to the point of encouraging those citizens to sue the state for discrimination in derogation of an agreement or a statutory provision requiring use of alternative forums or procedures.

III. *ALEXANDER* — A RETROSPECTIVE VIEW

At common law, agreements to arbitrate future disputes were not subject to specific enforcement. *See Allied – Bruce Terminix Co. v. Dobson*, 513 U.S. 265, 270-71 (1995) and cases cited therein. However, this traditional antipathy to arbitration as a dispute resolution procedure has yielded to both statutory modification and the realities of a litigation-prone society, to the point that a party which seeks to avoid the effect of an agreement to arbitrate now has the burden of showing what amounts to an affirmative defense — a statutory preclusion of arbitration of the subject matter. *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 227 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). As this Court put it in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991),

> If such an intention [to foreclose arbitration] exists, it will be discoverable in the text of [the statute], its legislative history, or an "inherent conflict" between arbitration and the [statute's] underlying purposes . . . [keeping] in mind that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration."

Gilmer, 500 U.S. at 26, *quoting*, *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983), and *McMahon*, *supra*, at 227.

The *Gilmer* decision disposed of virtually all of the bases upon which an agreement to arbitrate statutory claims could be disregarded, concluding in the context of the Age Discrimination in Employment Act ("ADEA") 29 U.S.C. § 621 *et seq.*, that:

(a) "[N]othing in the text of the ADEA or its legislative history explicitly precludes arbitration." 500 U.S. at 26.

(b) Although the ADEA "is designed not only to address individual grievances, but also to further important social policies," there is no "inherent inconsistency between these policies . . . and enforcing agreements to arbitrate age discrimination claims." 500 U.S. at 27.

(c) "Arbitration will [not] undermine the role of the EEOC," since "the EEOC's role in combating age discrimination is not dependent on the filing of a charge," "[s]uch [employment] disputes can be settled . . . without any EEOC involvement," and "the mere involvement of an administrative agency in the enforcement of a statute is not sufficient to preclude arbitration." 500 U.S. at 27-28.

(d) "[S]uspicion of arbitration" is "far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes." 500 U.S. at 30, *quoting Rodriguez de Quijas v. Shearson/American*

    (1) A speculation "that arbitration panels will be biased" is inappropriate, since this Court " 'decline[s] to engage in the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious and impartial arbitrators,' " and "[t]here has been no showing in this case that [contractual] provisions are inadequate to guard against potential bias." 500 U.S. at 30-31, *quoting Mitsubishi*, *supra*, at 634.

    (2) Although "discovery allowed in arbitration is more limited than in the federal courts . . . , by agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration,' " further counterbalanced by the fact that "arbitrators are not bound by the rules of

evidence." 500 U.S. at 31, *quoting Mitsubishi, supra*, at 628.

(3) "A further alleged deficiency of arbitration is that arbitrators often will not issue written opinions," but where written awards are required and the courts will continue to publish opinions construing the statute, such concerns are of no more moment than is the allowance of settlements of statutory claims. 500 U.S. at 31-32.

(4) Limitations on judicial review of arbitration awards do not make such review " 'insufficient to ensure that arbitrators comply with the requirements of the statute.' " 500 U.S. at 32 n.4, *quoting McMahon, supra*, at 232.

(5) The absence of broad equitable relief and other remedial power does "not preclude the EEOC from bringing actions seeking class-wide and equitable relief," nor should one presume that arbitrators have no power to issue a make-whole remedy. 500 U.S. at 32.

(e) Contentions of inequality of bargaining power are meritless unless they rise to the level of " 'such grounds as exist at law or in equity for the revocation of any contract,' " such as " 'fraud or overwhelming economic power.' " Such a claim "of unequal bargaining power is best left for resolution in specific cases." 500 U.S. at 32-33, *quoting* 9 U.S.C. §2 and *Mitsubishi, supra*, at 627.

The *Gilmer* decision then turned to the question of the continuing vitality and applicability of this Court's 1974 holding in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36. Much of the rationale of *Alexander* was overruled, including "the view that arbitration was inferior to the judicial process for resolving statutory claims":

> "We are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution."

500 U.S. at 34 n.5, *quoting Mitsubishi, supra*, at 626-27.

While noting several distinguishing features of the factual contexts in *Alexander* and in *Gilmer* [8], the decision in the latter case only identified three "important distinctions between the *Gardner-Denver* line of cases and the case before us." 500 U.S. at 35. These were:

(1) *Alexander*, as well as the two later decisions in *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981), and *McDonald v. West Branch*, 466 U.S. 284 (1984), arose out of election-of-remedies contexts in which the plaintiff had pursued claims through arbitration and had lost, whereupon the employer interposed the award as a bar to plaintiff's separately-filed statutory claims.[9] Therefore, "those cases did not involve the issue of the enforceability of an agreement to arbitrate statutory claims. Rather, they involved the quite-different issue of whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims." 500 U.S. at 35. The Court explained: "Since the employees there had not agreed to arbitrate their statutory claims, and the labor arbitrators were not authorized to resolve such claims, the arbitration in these cases understandably

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[8] "[A]n employee's contractual rights under a collective-bargaining agreement are distinct from the employee's statutory Title VII rights" (*Gilmer*, 500 U.S. at 34, *citing Alexander, supra*, at 49-50); "a labor arbitrator has authority only to resolve questions of contractual rights"; a Title VII action " 'is asserting a right independent of the arbitration process' "; *Alexander* expresses "a concern that in collective-bargaining arbitration 'the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit.' " *Gilmer*, 500 U.S. at 34, *quoting Alexander* at 49-50, 53-54, 58.

[9] *Alexander* involved a Title VII race discrimination claim, *Barrentine* a claim under the Fair Labor Standards Act, and *McDonald* dealt with allegations under 42 U.S.C. § 1983.

was held not to preclude subsequent statutory actions." *Id.*

(2) "[B]ecause the arbitration in those cases occurred in the context of a collective-bargaining agreement, the claimants there were represented by their unions in the arbitration proceedings. An important concern therefore was the tension between collective representation and individual statutory rights, a concern not applicable to the present case." *Id.*

(3) "Finally, those cases were not decided under the FAA, which . . . reflects a 'liberal federal policy favoring arbitration agreements.' " *Id, quoting Mitsubishi, supra,* at 625.

Summarizing these holdings, the Court stated: "We conclude that Gilmer has not met *his burden* of showing that Congress, in enacting the ADEA, *intended to preclude arbitration* of claims under that Act." *Gilmer*, 500 U.S. at 35. (Emphasis supplied).

A. There Is No Distinction Between the FAA and the LMRA as to Federal Policy.

What, then, remains of *Alexander*? The third "distinction" is one which requires little discussion. It makes no difference whether the Federal Arbitration Act or the Labor-Management Relations Act forms the basis for the agreement to arbitrate, since there is a "liberal federal policy favoring arbitration agreements" in both contexts. The presumption of arbitrability under collective-bargaining agreements was recognized clearly in *Textile Workers Union of America v. Lincoln Mills*, 353 U.S. 448, 451 (1957), holding that Section 301(a) of the LMRA

> authorizes federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements and includes within that federal law specific performance of promises to arbitrate grievances under collective bargaining agreements.

This holding contradicted Justice Frankfurter's dissenting opinion, in which it was argued that labor arbitration was

somehow of lesser dignity than commercial arbitration; *see* 353 U.S. at 466-69.

1. *Arbitration is the favored procedure for resolving labor disputes — including "individual" and "statutory" claims.*

At least from *Lincoln Mills* forward, this Court has continued to reiterate its endorsement of labor arbitration as a preferred venue for the resolution of employment disputes. And while Justice Frankfurter's dissent in that case deemed the majority's lack of mention of the FAA as a "silent" rejection of the applicability of that statute to collectively-bargained arbitration agreements (353 U.S. at 466), decisions construing the FAA and the LMRA have run on parallel tracks ever since. Elkouri & Elkouri, HOW ARBITRATION WORKS (5th ed. 1997), p. 31.

The Elkouri treatise follows this evolution from the "*Steelworkers Trilogy*,"[10] in which this court "enunciated the now well-known presumption of arbitrability of labor disputes," through the strengthening and expansion of that presumption[11] in a parade of decisions: *Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962) (state courts may enforce collective bargaining agreements, including arbitration clauses); *Teamsters Local 174 v. Lucas Flour*, 369 U.S. 95 (1962) (implying a no-strike obligation regarding issues subject to arbitration); *Smith v. Evening News Ass'n*, 371 U.S. 195 (1962) (individual employees can sue under Section 301 to enforce "uniquely personal" rights under a collective bargaining agreement); *John Wiley & Sons v. Livingston*, 376 U.S. 543 (1964) (once a court decides the issue is arbitrable, the arbitrator should decide both procedural and substantive issues under the agreement); *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965) (an employee who wishes to pursue claims under the agreement must first exhaust the agreement's grievance and arbitration procedure); *Boys Markets v. Retail Clerks Union Local 770*, 398 U.S. 235 (1970) (binding arbitration is the quid pro quo for an agreement not to strike, requiring a Court to enjoin the strike and compel arbitration of the underlying dispute).

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[10] *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 493 (1960).

[11] *Gateway Coal Co. v. United Mine Workers of America*, 414 U.S. 368 (1974) (decided only a few months after *Alexander*), extended the presumption of arbitrability to the question of whether a strike was statutorily protected by 29 U.S.C. § 143, a statute which was deemed by the Third Circuit to disfavor compulsory arbitration of safety disputes. 466 F.2d 1157 (3d Cir. 1972). Although there was no no-strike clause in the collective bargaining agreement, this Court recognized such an obligation was inherent in the collective bargaining relationship.

This was the state of the law at the time of the *Alexander* decision, and the pace of encouraging and deferring to the arbitral process accelerated during the period between *Alexander* and *Gilmer*. Milestones along that path include *Gateway Coal Co. v. United Mine Workers of America*, 414 U.S. 368 (1974), reaffirming the implied no-strike duty as to (statutory) safety issues; *Nolde Bros v. Bakery & Confectionery Workers, Local 358*, 430 U.S. 243 (1977), allowing arbitration of grievances which arose, or even arguably arose, prior to contract expiration; *Allis-Chalmers Mfg. Co. v. Lueck*, 471 U.S. 202 (1985), finding claims under state law which are based upon a collective bargaining agreement to be preempted, so that failure to pursue the contract grievance is fatal to the claim; and culminating in the reiteration of the language of *Warrior & Gulf Navigation Co.* in *AT&T Technologies v. Communications Workers of America*, 475 U.S. 643, 650 (1986):

> "An order to arbitrate . . . should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage."

(*Quoting Warrior & Gulf, supra*, 363 U.S. at 582-83.)

AT&T contains a thorough catalogue of the reasons for "the presumption of arbitrability for labor disputes," which "recognizes the greater institutional competence of arbitrators in interpreting collective-bargaining agreements" and " 'furthers the National Labor Policy of peaceful resolution of labor disputes and this best accords with the parties' presumed objections in pursuing collective bargaining.' " 475 U.S. at 650, *quoting Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364, 371-72 (1984).

2. *Deferral to arbitration — two concepts sharing a single name.*

For well over a decade, and well before *Gilmer*, the National Labor Relations Board has conferred substantial authority upon arbitrators to resolve legal and statutory issues, a subject analyzed in Hardin, ed., THE DEVELOPING LABOR LAW (3d ed. 1992) (hereinafter, "*DLL*"), ch. 18, pp. 1009 *ff.*[12] A brief digression appears necessary to distinguish between the two doctrines generally lumped together as "deferral" to the arbitration process by the NLRB. Prearbitral, or "*Collyer*," deferral, so-called because it was developed in a line of Board decisions emanating from *Collyer Insulated Wire*, 192 N.L.R.B. 837 (1971), results in the Board's ceding jurisdiction over an unfair labor practice case to an arbitrator; *Spielberg*[13] deferral, on the other hand, is Board acceptance of the outcome of an arbitration proceeding.

Both forms of deferral have limitations which the Board has developed over time. *Spielberg* deferral generally requires that four preconditions be met: (1) the arbitration procedures must be "fair and regular"; (2) all parties must agree to be bound by the arbitrator's award; (3) the arbitrator's decision cannot be deferred to if it is "repugnant to the purposes and policies" of the Labor Management Relations Act; and (4) the statutory unfair labor practice issue must have been presented to and considered by the arbitrator.[14]

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[12] This expansion of — or, more accurately, this return to — earlier Board precedent commenced in 1984 with *United Technologies Corp.*, 268 N.L.R.B. 557, and *Olin Corp.*, 268 N.L.R.B. 573 (1984). *See generally*, *Hammontree v. NLRB*, 925 F.2d 1486, 1503 (D.C. Cir. 1991) (Edwards, J., concurring), which suggests that labor organizations possess the authority to waive the statutory rights of members of the bargaining units they represent in exchange for roughly equivalent contractual rights, supporting that conclusion with specific reference to the *Alexander – Barrentine – McDonald* decisional line. *Hammontree* is analyzed *infra* at pp. 17-21.

[13] *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080 (1955).

Collyer deferral is a much more flexible concept. While judicial deference to the grievance-and-arbitration procedure, manifested by a requirement of exhaustion of those processes unless they can be shown to be "futile," has long been the standard, the NLRB has never applied the exhaustion principle as a rigid requirement. *DLL* at 1019. As explained in *United Technologies Corp.*, 268 N.L.R.B. 557, 558 (1984), the analysis is multifaceted (numbering supplied):

> (1) The dispute arose within the confines of a long and productive collective bargaining relationship; (2) there was no claim of employer animosity to the employees' exercise of protected rights; (3) the parties' contract provided for arbitration in a very broad range of disputes; (4) the arbitration clause clearly encompassed the dispute at issue; (5) the employer had asserted its willingness to utilize arbitration to resolve the dispute; and (6) the dispute was eminently well suited to resolution by arbitration.

This Court, in *William E. Arnold Co. v. Carpenters District Council of Jacksonville & Vicinity*, 417 U.S. 12, 16 (1974), decided the same term as *Alexander*, expressed the view, albeit in dictum, that pre-arbitral deferral by the Board "harmonizes" with Congress' desire to encourage use of contractual dispute resolution processes. A decade earlier, deferral to arbitration of inter-union jurisdictional disputes was blessed in *Carey v. Westinghouse Elec. Corp.*, 375 U.S. 261, 272 (1964):

> However the dispute be considered . . . we see no barrier to use of the arbitration procedure. . . . By allowing the dispute to go to arbitration its

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[14] The first three criteria are found in *Spielberg*; the fourth, however, is of more recent vintage, and its parameters are imprecise. *DLL*, pp. 1018-19 (fourth element is "rather variably administered," and may require only that it is not "evident" that the unfair labor practice issue was neither presented nor considered in the arbitration).

> fragmentation is avoided to a substantial extent. . . . Meanwhile the therapy of arbitration is brought to bear in a complicated and troubled area.

The analogy between pre-arbitration deferral standards used by the NLRB under *Collyer* and this Court's decision in *Gilmer* is informative: in *Gilmer*, this Court eschewed the six-part *Collyer* model (which it has never specifically endorsed), opting for the much less formalistic approach discussed above. But while there are definite parallels between the *Collyer* and *Gilmer* formulae, in *Alexander* this Court appeared to adopt a bright-line test, refusing to defer to *any* arbitral decision of an employment discrimination claim, thus avoiding any reliance upon *Spielberg* (or any other) standards. *See* 415 U.S. at 55, 56 and n.17 (declining to adopt *Spielberg* tests). Upon more careful study, however, it appears that the general approach of *Alexander* can be harmonized with that employed under *Spielberg*.

3. *Hammontree — reconciling Alexander with national labor policy.*

In *Hammontree v. NLRB*, 925 F.2d 1486 (D.C. Cir. 1991), a union member brought an unfair labor practice charge against his employer, Consolidated Freightways Corporation, alleging he had been retaliated against for filing earlier grievances against Consolidated under the collective bargaining agreement between Consolidated and his union, a Teamsters local. The National Labor Relations Board held that Hammontree's claims should have been presented through the grievance procedure of the collective bargaining agreement. *Consolidated Freightways Corp.*, 288 N.L.R.B. 1252 (1988). After a panel decision (894 F.2d 438 (D.C. Cir. 1990)) which remanded the case to the NLRB with instructions, rehearing *en banc* was held.

The majority of the Court, including two judges who now sit as Justices of this Court, analyzed the two NLRB policies which are both characterized as "deferral," but observed preliminarily that

> the Board's two "deferral" policies operate in different ways and serve different purposes. [footnote omitted] Pre-arbitral deferral (what we will, for

> clarity's sake, call "*deferment*") resembles the exhaustion requirements often found in administrative regimes and the abstention doctrines followed by federal courts. Post-arbitral deferral (what we will call "*deference*") resembles appellate judicial deference.

925 F.2d at 1490.

Under this analytical model, *Alexander – Barrentine – McDonald* "deferral" is

> an unfortunate misnomer. "Post-arbitral deferral" is not deferral at all, but deference, a limitation on the scope of the Board's review of arbitration awards. More importantly, pre- and post-arbitral deferral differ substantially in justification and in practice.

Hammontree, 925 F.2d at 1491 n.8. Thus, the issue presented in *Hammontree* was one of exhaustion of the grievance procedure — "deferment" — along the lines which this Court would establish later that year in *Gilmer* — "the now-familiar two-step analysis set forth in *Chevron U.S.A., Inc. v. National Resources Defense Council*, 467 U.S. 837 (1984)," summarized as "*Chevron I*" and "*Chevron II.*" "*Chevron I*" determinations consider "whether Congress has directly spoken to the precise issue in question" and, in so doing, has affirmatively prohibited an exhaustion-of-remedies process. *Chevron*, 467 U.S. at 842-43 and n.9. If, however, "the statute is 'silent or ambiguous with respect to the specific issue,' and if 'the agency's answer is based on a permissible construction of the statute,' we must defer." *Hammontree*, 925 F.2d at 1491, *quoting Chevron* at 843.

The majority in *Hammontree* carefully considered the "*Chevron I*" arguments presented in that appeal and found no clear expression of Congressional intent to preclude the arbitration of statutory discrimination claims under Section 8(a)(3). Among the contentions considered and rejected in *Hammontree* is one which is urged once more in this case — that Section 203(d) of the Labor-Management Relations Act, 29 U.S.C. § 173(d),[15] implicitly limits its endorsement of grievance and arbitration settlements to "contract disputes":

> Initially, we observe that §203(d) reads most naturally as a general policy statement in favor of private dispute resolution, not as any kind of limitation on Board authority. [footnote omitted] But even if we were to assume *arguendo* that §203(d) does in some way limit the Board's deferment authority, Hammontree's argument fails on its own terms, for his §8(a)(3) claim *does* "aris[e] over [contract] application or interpretation." Hammontree's discrimination claim, although raised under §§ 8(a)(1) and 8(a)(3), is also actionable under the contract.

925 F.2d at 1493.

The *Hammontree* majority also refused to accept another linchpin of Wright's argument, as well as that of several *amici* supporting his position, that the statutory preference for private dispute resolution is only involved when "the [individual] employee has [ ] *voluntarily* submitted his [ ] claim to arbitration' " [*quoting*, with supplied emphasis, Chief Judge Mikva's dissenting opinion, 925 F.2d at 1510].

> To contend that Congress' decided preference" —and a collectively bargained arbitration clause — can be automatically defeated at the option of an aggrieved employee is not only contrary to congressional intent, but also inconsistent with the fundamental tenet of labor law that a sound collective bargaining agreement binds all employees.

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[15] Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement.

925 F.2d at 1494, n.15. And, finally, this "voluntary individual agreement" contention would, if accepted, lend itself to game-playing by the union, since " 'a union could circumvent the contractual grievance procedure by the simple expedient of having the individual employee, instead of the union, file the charge with the Board.' " *Consolidated Freightways Corp.*, 288 N.L.R.B. 1252, 1255 (1988), *quoted in Hammontree,* 925 F.2d at 1494 n.15.

Having disposed of the "*Chevron I*" test, the court in *Hammontree* proceeded to deal with the employee's assertion that *Alexander v. Gardner-Denver Co.* forecloses arbitration of cases involving "individual employee rights." Reviewing the *Alexander* rationale, as further addressed in *Barrentine* and *McDonald*, the court rejected Hammontree's argument that, because of those decisions, " 'individual statutory rights cannot be sacrificed on the altar of arbitration' " and that "these cases limit the Board's discretion to defer claims in which an individual seeks to vindicate personal rights under the NLRA." *Hammontree*, 925 F.2d at 1496. The Court stated:

> We disagree. In *Alexander, Barrentine,* and *McDonald*, the Supreme Court held that when individual statutory rights are at stake, arbitration of a contractual claim does not preclude a subsequent statutory claim. In this case, however, we consider not the preclusive effect of arbitration awards but rather the Board's authority to require the exhaustion of arbitration remedies. These issues are analytically distinct . . . Deferment does not diminish Hammontree's right to a public forum; it merely delays it.

925 F.2d at 1496-97.

Both the majority opinion in *Hammontree* and the concurrence authored by Judge Edwards point out, however, that this Court's decisions proceeding from *Alexander* have established a seeming distinction for the "individual rights and remedies" created under Title VII of the Civil Rights Act of 1964, the Fair Labor Standards Act, and the Civil Rights Act of 1871, which were deemed in *Alexander, Barrentine,* and *McDonald* to be "independent of any contractual rights and remedies." 925 F.2d at 1500 (Edwards, J., concurring), *quoting Alexander,* 415 U.S. at 54, 50 and *Barrentine*, 450 U.S. at 745, 740. Both the majority and the concurring opinions also note that exhaustion of arbitration remedies under Title VII is seemingly inconsistent with this Court's refusal to permit a tolling of procedural time limits in order to permit pursuit of the contractual grievance processes. *International Union of Electrical, Radio & Machine Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 239 (1976); *see Hammontree*, 925 F.2d at 1497-98 (majority op.), 1500-01 (concurring op.); and *see Johnson v. Railway Express Agency*, 421 U.S. 454, 461 (1975) (filing of Title VII discrimination charge does not toll statute of limitations applicable to 42 U.S.C. § 1981 claim).[16]

But the *Hammontree* court spoke without the benefit of this Court's decision in *Gilmer*, and the decisions which rely on or refer to *Alexander* do not, especially when the impact of *Gilmer* is considered, require the *dictum* of *Hammontree*'s discussion of "employment" discrimination claims, as differented from "labor law" discrimination claims, to be perpetuated, as becomes clear when a post-*Gilmer* analysis of *Alexander* is made.

B. There Is No "Tension" Here Between Collective Representation and Individual Rights.

1. *Unfair representation cannot be presumed.*

If the "important concern" identified in the *Gilmer* discussion of *Alexander* as "the tension between collective representation and individual statutory rights" (*Gilmer*, 500 U.S. at 35) were in fact an integral part of the *Alexander* rationale, it is curious that this "concern" appears only in a footnote: "In arbitration, as in the collective bargaining process, the interest of the individual employee may be subordinated to the collective interest of all employees in the bargaining unit." 415 U.S. at 58 n.19. At the time and in the context of the decision in *Alexander*, discriminatory behavior by unions was a concern which was no less important that discrimination by employers. The first decade of Title VII enforcement resounded with class actions challenging collectively-bargained seniority systems, union complicity in employers' biased practices and policies, and other conduct which would be wholly unsuitable for resolution through the arbitral process.[17] Moreover, in a case in which the complaining employee does not share the race, gender, or ethnic background of a majority of the bargaining unit, — which is not the pattern presented here — the risk of unfair representation *may* be real. Notwithstanding those assumptions, however, a labor organization is legally bound to provide fair representation to all members of the bargaining unit,[18] and a presumption that pursuit of a grievance to arbitration would be "futile" is one which should not arise in the absence of evidence, as opposed to stereotypical conjecture.[19]

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[16] There is, however, no issue regarding the timely filing of a charge of discrimination. No party to this or comparable cases has contended that the requirement of exhaustion of remedies deprives the *EEOC* of jurisdiction to investigate and attempt conciliation of charges. The exhaustion requirement applies to *litigation*, not administrative action. *See Gilmer*, 500 U.S. at 27-28.

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[17] Often, unions and employers were named as co-defendants in such cases. *See, e.g., Teamsters v. United States*, 431 U.S. 324 (1977); *East Texas Motor Freight Syst. v. Rodriguez*, 431 U.S. 395 (1977); *America Tobacco Co. v. Patterson*, 456 U.S. 63 (1982). In fact, *Alexander*'s footnote 19 concludes with the observation that it is "noteworthy that Congress thought it necessary to afford the protections of Title VII against unions as well as employees." 415 U.S. at 58 n.19.

[18] Discrimination, including racial bias, by a union breaches its duty of fair representation. *Longshoremen (ILA) Local 367 (Galveston Maritime Ass'n)*, 148 N.L.R.B. 897 (1964), *enf'd*, 368 F.2d 1010 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967).

[19] As a precondition to bringing suit for breach of a collective bargaining agreement,

> individual employers wishing to assert contract grievances must *attempt* use of the contract grievance procedure . . . [T]here can be no doubt that the employee must afford the union the opportunity to act on his behalf.

Republic Steel Corp. v. Maddox, 379 U.S. 650, 652, 653 (1965) (emphasis (Cont'd)

In the case at bar, why should it be assumed that Caesar Wright, a member of ILA Local 1422 for nearly 30 years, has been victimized by his fellow Longshoremen? Wright's return to work would have prejudiced no one in the Union, and it is foolish to contend that Local 1422 engaged in discrimination against Wright on any basis. Nor has Wright contended that he was unfairly represented; the record is devoid of any such accusation, although several of the *amici* seem enamored of this idea.[20] It is certainly possible to construct a hypothetical set of facts in which the "majoritarian" impulse of a labor organization might trump its desire to afford fair representation to individual interests. But to conclude, without any evidence, that this "concern" automatically renders arbitration unavailable as a remedy would deprive unions of *any* authority, as well as any incentive, to present individual grievances.

2. *Wright could have pressed his own grievance.*

A bargaining unit member whose union refuses to pursue his grievance to arbitration has at least two choices other than acquiescence: He may claim unfair representation in an unfair labor practice charge filed with the NLRB or a civil action in court,[21] or may instead go his own way, prosecuting his own grievance. Section 9(a) of the Labor Management Relations Act, 29 U.S.C. § 159(a), after generally stating the principle that representation by a certified or recognized collective bargaining representative is exclusive, ends with two provisos modifying that concept:

> *Provided*, that any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the

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(Cont'd)
in original). The burden of proving the futility of such exhaustion rests on the plaintiff. *Glover v. St. Louis – San Francisco Ry.*, 393 U.S. 324 (1969); *and see Hines v. Anchor Motor Freight*, 424 U.S. 554 (1976).

[20] *See, e.g.*, Brief for the United States and the Equal Employment Opportunity Commission, pp. 9, 14-20.

[21] Either of the procedures requires compliance with the six-month statute of limitations found in 29 U.S.C. § 160(b).

> bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

This is the rule explained in *Maddox*: since the individual may not "completely sidestep available grievance procedures in favor of a lawsuit," 379 U.S. 653, exhaustion must be attempted.[22]

The *Maddox* rationale was further developed in *Vaca v. Sipes*, 386 U.S. 171 (1967). In language which is particularly instructive, Justice White spoke for the Court in explaining why exhaustion of grievance procedures is not an inflexible precondition to the pursuit of contract based claims:

> [B]ecause these contractual remedies have been devised and are often controlled by the union and the employer, they may well prove unsatisfactory or unworkable for the individual grievant. The problem then is to determine under what circumstances the individual employee may obtain judicial review of his breach-of-contract claim despite his failure to secure relief through the contractual remedial procedures.

386 U.S. at 185. Only two "circumstances" warranting a failure to exhaust were identified: (1) "when the conduct of the employer amounts to a repudiation of those contractual procedures," *id.*, or

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[22] In language remarkably applicable to our facts, Justice Harlan concluded his majority opinion in *Maddox* with the observation that

> the case is before us on stipulated facts; in neither the facts or the pleadings is there any suggestion that Maddox could not have availed himself of the grievance procedure instead of waiting . . . and bringing a court suit.

379 U.S. at 659. *And cf., Emporium Capwell v. Western Addition Community Org.*, 420 U.S. 50, 61 n.12 (1975) (explaining the proviso permitting individual presentation of grievances so long as the union has been given the opportunity to present the grievance, and noting that an employer need not agree to entertain the employee's presentation).

> if, as is true here, the union has sole power under the contract to invoke the higher stages of the grievance procedure, *and* if, as alleged here, the employee-plaintiff has been prevented from exhausting his contractual remedies by the union's wrongful refusal to process the grievance,

which the Court deemed to require the non-exhausting plaintiff to "prove that the union as bargaining agent breached its duty of fair representation in its handling of the employee's grievance." 386 U.S. at 185, 186. *And see, Hines v. Anchor Motor Freight*, 424 U.S. 554 (1976).

The *Maddox – Vaca – Hines* model is thus illustrative of the answer to the questions raised in *Alexander*: The plaintiff may not simply assert that exhaustion to, and through, arbitration would be unavailing or "controlled" by the union; he must prove what efforts he made to pursue his contractual remedies and the manner in which the union is unresponsive or incapable of asserting his claims. Any lesser burden on the plaintiff renders the contractual grievance procedure a nullity for any issue which implicates statutory issues.

3. *The employer cannot negotiate agreements with bargaining unit employees.*

Yet another illogical result of the refusal to extend *Gilmer* to collectively bargained arbitration processes is the apparent invitation that presents to employers to secure agreements with bargaining unit members which would elect arbitration as a forum for the resolution of "employment law" claims, including those based on statutes such as the ADA. But this Court has repeatedly found that an employer violates its duty to bargain when it relies on, or attempts to negotiate, employment contracts with individual bargaining unit members. *J.I. Case v. NLRB*, 321 U.S. 332, 337-38 (1944); *NLRB v. Insurance Agents*, 361 U.S. 477, 484-85 (1960); *and see, Moise & Son Trucking*, 197 N.L.R.B. 198 (1972) (violation of § 8(a)(5) found when employer sought individual contracts with employees after having recognized union).

C. Agreements to Arbitrate Statutory Claims.

The final distinction of *Alexander* made by this Court in *Gilmer* has two parts: First, *Alexander, Barrentine,* and *McDonald* were concerned with the effect of an arbitration award upon a subsequent discrimination claim in federal court: not "the enforceability of an agreement to arbitrate statutory claims," but "the quite different issue of whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims." *Gilmer*, 500 U.S. at 35. Consequently, *Alexander* does not apply where exhaustion, rather than election, of remedies is at issue.[23]

The second element of the *Alexander/Barrentine/McDonald* facts which was not found to be present in *Gilmer* was that "[s]ince the employees there had not agreed to arbitrate their statutory claims, and the labor arbitrators were not authorized to resolve such claims, the arbitration in those cases understandably was held not to preclude subsequent statutory actions." *Gilmer*, 500 U.S. at 35. Parsing this sentence requires that one refer back to the facts of *Alexander, Barrentine,* and *McDonald.*

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[23] The *amicus* brief filed by the United States and the EEOC contends that

> *Alexander* cannot be distinguished on the ground that the employee in *Alexander* first proceeded through arbitration, while petitioner did not. To the contrary, petitioner here invoked his contractual remedies and took them as far as he could, *i.e.*, until the union informed him that it would not pursue them further.

(Brief for the United States and EEOC, p. 9). But the Government does not understand the facts. Wright never pressed the union to "pursue" his grievance, and the union merely "recommended that he retain a private attorney." (Stipulation 22, J.A. 55a.) When Wright did apply pressure to Local 1422, it engineered a purported "second" grievance, which formed the genesis for an action filed fifteen months thereafter, and thirty-two months after the refusal to allow Wright to return to work, brought by the Local under 29 U.S.C. § 185. This suit, filed after the Fourth Circuit had affirmed the dismissal of Wright's claims, was dismissed by an unpublished order and is now pending before the Fourth Circuit. *See* Petitioner's Brief, p. 9, n.4.

1. *Alexander v. Gardner-Denver Co.*[24]: Harrell Alexander, Sr. was a drill operator trainee who was discharged because Gardner-Denver, his employer, said he was producing too many parts that had to be scrapped. As a member of a bargaining unit represented by Steelworkers Local 3029, he was subject to the terms of a collective bargaining agreement agreeing that neither the employer nor the union would discriminate against any employee or applicant "on account of race, color, religion, sex, national origin, or ancestry." The agreement also contained a grievance and arbitration procedure covering "differences . . . between the Company and the Union as to the meaning and application of the provisions of this Agreement" as well as "any trouble aris[ing] in the plant." 415 U.S. at 39-40. Alexander filed a grievance challenging his discharge.

"In the final pre-arbitration step" of the grievance procedure, "petitioner raised, apparently for the first time, the claim that his discharge resulted from racial discrimination." When the arbitration hearing was held, Alexander "testified that his discharge was the result of racial discrimination," telling the arbitrator he had filed a charge of discrimination with the Colorado Civil Rights Commission "because 'he could not trust the union.' " 415 U.S. at 42. In ruling that Alexander had been "discharged for just cause," the arbitrator said nothing about the racial discrimination claim.

Consequently, it comes as no surprise that this Court had no hesitation in reversing the district court's conclusion, as affirmed *per curium* by a Tenth Circuit panel, that

> petitioner, having voluntarily elected to pursue his grievance to final arbitration under the nondiscrimination clause of the collective-bargaining agreement, was bound by the arbitral decision and thereby precluded from suing his employer under Title VII.

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[24] *Alexander* was preceded by *Iowa Beef Packers, Inc. v. Thompson*, 405 U.S. 228 (1972), in which a writ of certiorari was dismissed as improvidently granted because the union contract in question was confined to grievances "pertaining to a violation of the Agreement," thereby rendering premature any assessment of the issues later addressed in *Alexander* and in *Barrentine*.

415 U.S. at 43. There is no further discussion of "what happened" in the arbitration process.

2. *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981). Two truck drivers represented by Teamsters Local 878 took grievances to a joint labor-management committee for a "final and binding decision." The grievants sought pay for time "worked," including pre-trip safety inspection and transportation time. After the grievances were "rejected without explanation," the two sued their employer under the Fair Labor Standards Act. Plaintiffs argued they had "no intent to submit the FLSA claim to arbitration and it was not submitted to arbitration," but a majority of this Court treated that factual dispute as immaterial, 450 U.S. at 731 n.4, and held that individual rights to overtime pay cannot be "waived" even if they are submitted to arbitration, declining to accept the arguments of Chief Justice Burger and then-Justice Rehnquist that

> It makes neither good sense nor sound law to read the broad language of *Gardner-Denver* — written in a civil rights *discrimination* case — to govern a routine wage dispute over a matter traditionally entrusted by the parties' arms-length bargaining to binding arbitration.

450 U.S. at 754 (Burger, Ch.J., dissenting) (emphasis in original).

3. *McDonald v. City of West Branch*, 466 U.S. 284 (1984). Gary McDonald, a discharged city police officer, prosecuted an arbitration proceeding under the collective bargaining agreement between the city and the United Steelworkers, contending there was "no proper cause" for his termination. An arbitrator sustained the discharge as based on just cause. McDonald then sued the city and a number of its officials under 42 U.S.C. § 1983, claiming he had been fired for exercising First Amendment rights. A jury returned a verdict against the Chief of Police but in favor of all other defendants. The Seventh Circuit reversed the verdict against the Police Chief due to the arbitrator's award, relying on principles of res judicata and collateral estoppel. This Court, in a brief opinion citing the holdings and rationales of *Alexander* and *Barrentine*, determined the arbitration award to be devoid of preclusive effect because the 1871 Civil Rights Act was "intended to be judicially enforceable."

The foregoing discussion points strongly to the conclusion that the discrimination claims in *Alexander*, the statutory overtime claim in *Barrentine*, and the constitutional free speech claim in *McDonald* were not submitted to the arbitrators nor were they ruled on by them. The contract in *Barrentine* was quite vague regarding what issues could be grieved and arbitrated, while the decision in *McDonald* only recites the terms of the agreement's "management rights" clause. It is also worth mentioning that in *McDonald* the Union and the AFL-CIO, as *amici*, proudly stated

> that under most collective bargaining agreements the union "controls access to the arbitrator, the strategy and tactics of how to present the case, the nature of the relief sought, and the actual presentation of the case."

466 U.S. at 291 n.10. It follows that nothing in the *Alexander/Barrentine/McDonald* fact patterns is pertinent to our case.

IV. RESOLVING THE CONFLICT

As noted at the outset (Respondents' Brief pp. 3-5, *and see* Respondents' Brief in Opposition to Petition for Writ of Certiorari, pp. 7-11), the Fourth Circuit's decision in this case presents no "conflict" with the decisions of other Courts of Appeals. *Wright* stands for the proposition that where the issue to be arbitrated clearly falls within the type of question which the collective bargaining agreement has committed to arbitral resolution, the grievant must *at least* attempt to follow that procedure. Nonetheless, inasmuch as the Petitioner insists that this case is the appropriate vehicle for resolving an intercircuit conflict, it seems appropriate to analyze the conflict which admittedly does exist between the views of the Fourth Circuit, represented by *Austin v. Owens Brockway Glass Container Co.*, 78 F.3d 875 (4th Cir.), *cert. denied*, __ U.S. __, 117 S. Ct. 432, 136 L. Ed. 2d 330 (1996), and those of other United States Courts of Appeals.

A. *Austin*

Shortly after *Gilmer* was decided, Congress enacted the Civil Rights Act of 1991, which incorporated as Section 118 the following:

> Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title [enacting section 1981a of this title and section 601 of Title 2, The Congress, amending this section, Sections 1988, 2000e, 2000e-1, 2000e-2, 2000e-4, 2000e-5, 2000e-16, 12111 and 12112 of this title, and Section 626 of Title 29, Labor, and enacting provisions set out as notes under this section and section 2000e and 2000e-4 of this title].

Pub. L. 102-166, § 118, 105 Stat. 1071, 1081 (Nov. 21, 1991).

Congressional approval of alternative dispute resolution, explicitly including arbitration, as a means of achieving settlement of employment discrimination claims, led in turn to the decision in *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir.), *cert. denied*, __ U.S. __, 117 S. Ct. 432, 136 L. Ed. 2d 330 (1996). Rejecting the arguments advanced by the EEOC as *amicus curiae*, *Austin* held that a plaintiff's failure to process employment discrimination claims under a collectively-bargained grievance-arbitration procedure precludes the filing of an ADA lawsuit because such failure deprives a federal district court of jurisdiction over the case.

Recognizing that controlling precedent in that Circuit says that arbitration under a collective bargaining agreement is not governed by the Federal Arbitration Act, the court in *Austin* explained "[t]he language of the statutes could not be any more clear in showing Congressional favor towards arbitration." 78 F.3d at 881. Thus,

> voluntary agreements to arbitrate statutory claims are allowed. To decide otherwise, we would have to hold that *Gilmer* has no effect at all and that *Alexander* is still the law that statutory claims cannot be the subject of required arbitration.

Id at 882.

In conclusion, *Austin* reminds us

> the rule of the Supreme Court and this circuit is that an employee must follow the grievance procedure established by the collective bargaining agreement prior to filing suit in federal court. . . .Thus, an employee cannot sue an employer without first going through the grievance procedure, and this is what Miss Austin is attempting to do. We need not decide any question of union good faith in this case (and none has been suggested), because Miss Austin must pursue her claim under the grievance procedure.

78 F.3d at 855 (citations omitted).

B. *Austin* Applied and Rejected.

Since *Austin* was decided, the opinion has been cited in a host of judicial opinions. Inasmuch as the majority of these cases do not involve arbitration pursuant to a collective bargaining agreement, such decisions are listed in the accompanying footnote[25]

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[25] NASD arbitration: *Seus v. John Nuveen & Co.*, __ F.3d __ (3d Cir. June 8, 1998); *Friedman v. Metropolitan Life Ins. Co.*, 1996 U.S. Dist. Lexis 19889 (S.D.N.Y. June 19, 1996); *Smith v. Lehman Bros., Inc.*, 71 FEP Cas. 1494 (S.D.N.Y. 1996); *Randleman v. New York Life Ins. Co.*, 1996 U.S. Dist. Lexis 13956 (M.D. N.C. Aug. 9, 1996); *Satarino v. A.G. Edwards & Sons, Inc.*, 941 F. Supp. 609 (N.D. Tex. 1996). Employee handbook: *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832 (10th Cir. 1997); *Topf v. Warnaco, Inc.*, 942 F. Supp. 762 (D. Conn. 1996). Medical services contract: *McCrea v. Drs. Copeland, Hyman & Schackman, P.A.*, 945 F. Supp. 879 (D. Md. 1996). Individual employment contract: *Connors v. Amisub Inc.*, 5 AD Cas. 961 (S.D. Fla. 1996); *Rudolph v. Alamo Rent A Car, Inc.*, 952 F. Supp. 311 (E.D. Va. 1997); *EEOC v. Frank's Nursery & Crafts, Inc.*, 966 F.

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and will not be further discussed in this brief. As to decisions reached in the collective bargaining context, *Austin* has been followed in *Gingles v. Bethlehem Steel Corp.*, __ F.3d __ (4th Cir. Apr. 22, 1998) (mem.); *Nowlin v. Westvaco Corp.*, 1996 U.S. Dist. Lexis 17509 (W.D. Va. June 7, 1996); *Chenowith v. Asplundh Tree Expert Co.*, 928 F. Supp. 605 (D. Md. 1996); *Hampton v. Kroger Co.*, 1996 U.S. Dist. Lexis 14407 (W.D. Va., Sept. 27, 1996); *Bright v. Norshipco.*, 951 F. Supp. 95 (E.D. Va. 1997) *aff'd mem.*, 133 F.3d 913 (4th Cir. 1998); *Jessie v. Carter Health Care Center, Inc.*, 930 F. Supp. 1174 (E.D. Ky. 1996); *Baker v. Kaiser Aluminum & Chemical* Corp., 951 F. Supp. 953 (E.D. Wash. 1996); *Henry v. Colonial Baking Co.*, 952 F. Supp. 744 (M.D. Ala. 1996); *Brummett v. Copaz Packing Corp.*, 954 F. Supp. 160 (S.D. Ohio 1996); *remanded*, __ F.3d __, 1998 U.S. App. Lexis 2144 (6th Cir. Feb. 11, 1998); *Baert v. Euclid Beverage, Ltd.*, 954 F. Supp. 170 (N.D. Ill. 1997); *Almonte v. Coca-Cola Bottling Co.*, 959 F. Supp. 569 (D. Conn. 1997); *Humphrey v. Kroger Co.*, 154 L.R.R.M. 3086, 7 A.D. Cas. 383 (E.D. Tenn. 1997); *Moore v. Duke Power* Co., 971 F. Supp. 978 (W.D. N.C. 1997); *Turner v. Bell Atlantic–Virginia, Inc.*, 1997 U.S. Dist. Lexis 11192 (W.D. Va. May 5, 1997); *Brown v. ABF Freight Syst., Inc.*, 1997 U.S. Dist. Lexis 22105 (E.D. Va. Apr. 21, 1997), *reconsideration denied*, 158 L.R.R.M. 2050 (1998); *Williams v. Earthgrains Co.*, 1998 U.S. Dist. Lexis 8147 (W.D. N.C. Apr.

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Supp. 500 (E.D. Mich. 1997). Application form (signed by employees who were minors at the time): *Sheller v. Frank's Nursery & Crafts, Inc.*, 957 F. Supp. 150 (N.D. Ill. 1997). Family and Medical Leave Act: *O'Neil v. Hilton Head Hospital*, 115 F.3d 272 (4th Cir. 1997); *but see Brown v. Trans World Airlines*, 127 F.3d 337, 342 (4th Cir. 1997) (FMLA claim not arbitrable because arbitration clause was narrowly drawn). There are, of course, many other decisions concerning the arbitration of discrimination claims which do not cite or rely on *Austin*. *See, inter alia, Reese v. Commercial Credit Corp.*, 955 F. Supp. 567 (D. S.C. 1997) (Family and Medical Leave Act claims must be arbitrated pursuant to employer's personnel policy); *Smith v. CPC Foodservice*, 955 F. Supp. 84 (N.D. Ill. 1997) (same under collective bargaining agreement, without reference to *Austin*, and decided before the Seventh Circuit's opinion in *Pryner*.)

22, 1998); *Childs v. Meadowlands Basketball Assoc.*, 954 F. Supp. 994 (D. N.J. 1997) (no reference to *Austin*); *and see*, *Nalichowski v. Capshaw*, 1996 U.S. Dist. Lexis 14031 (E.D. Pa. Sept. 20, 1996) ("free speech" rights of community college employee under 42 U.S.C. § 1983 and national origin discrimination claims subject to mandatory arbitration, rather than court action; pre-deprivation due process claim allowed to proceed). The same result has been reached, without reference to *Austin*, in *Washington v. Crawford Steel Co.*, 6 AD Cas. 150 (N.D. Ill. 1996). And in *Richard v. Bell Atlantic Corp.*, 1997 U.S. Dist. Lexis 8614 (D.D.C. Feb. 18, 1997), a plaintiff whose claims had been dismissed in an earlier filed case in federal court in Virginia was held estopped to seek a different outcome in another forum; Judge Sporkin found that the *Austin* exhaustion rule was not inconsistent with D.C. Circuit precedent, citing *Cole v. Burns Int'l Security Servs.*, 105 F.3d 1465 (D.C. Cir. 1997). Moreover, although determining that *Alexander* rather than *Gilmer* governed with respect to a plaintiff's sexual harassment claim and that all of the arguments advanced by the employer were unpersuasive, the court in *Krahel v. Owens – Brockway Glass Container, Inc.*, 971 F. Supp. 440, 454-55 (D. Ore. 1997), stayed further proceedings to direct the plaintiff to exhaust the collectively bargained grievance procedure, preserving judicial relief "[i]n the event that plaintiff's worst fears regarding that procedure materialize."

Pryner v. Tractor Supply Co., 927 F. Supp. 1140 (S.D. Ind. 1996) was the first decision to cite on its merits, and to challenge, the *Austin* rationale, insisting, "The fatal flaw in *Austin* is its failure to fully consider the prior holding of *Gardner-Denver*." 927 F. Supp. at 1145. While conceding that *Alexander*'s " 'mistrust of the arbitral process' has plainly been overcome by more recent decisions of the Court," *id.* at 1145, it insisted that *Alexander* was not overruled by *Gilmer*, "and the continuing vitality of *Gardner-Denver* was recognized by the Court even more recently in *Livadas v. Bradshaw*, [512] U.S. [107, 127] n.21 . . . ." *Id.* at 1146. This ruling was affirmed by the Seventh Circuit, 109 F.3d 354, *cert. denied*, __ U.S. __, 118 S. Ct. 294, 139 L. Ed. 2d 227 (1997). Judge Posner's opinion first disagreed with the Fourth Circuit's conclusion that the Federal Arbitration Act is inapplicable to cases arising under a collective bargaining agreement, but then narrowly limited its affirmance of the district court's ruling:

> All we are holding is that the union cannot consent for the employee by signing a collective bargaining agreement that consigns the enforcement of statutory rights to the union-controlled grievance and arbitration machinery created by the agreement.

109 F.3d at 363.

Upon careful scrutiny, *Pryner* reveals a deep-seated mistrust of labor arbitration. Even though the employers in that case

> concede[d] that to the extent that the rights conferred by the collective bargaining agreements, or the sanctions available to the arbitrators, fall short of fully vindicating the plaintiffs' substantive and remedial statutory rights, the plaintiffs will be free to resume their suits after the arbitrators render their awards, having filed the suits within the statute of limitations.

the court continued,

> The honey-tongued assurances of the employers' able counsel and their amici, unusually aligned with the unions' interest in controlling their members' access to remedies, do not persuade us that there is no genuine conflict between employer and employee interests in these cases. . . .
>
> The essential conflict is between majority and minority rights. The collective bargaining agreement is the symbol and reality of a majoritarian conception of workers' rights. An agreement negotiated by the union elected by a majority of the workers in the bargaining unit binds all the members of the unit, whether they are a part of the majority or for that matter even members of the union. . . . We may assume that the union will not engage in actionable discrimination against minority workers. But we may not assume that it will be highly sensitive to their special interests, which are the interests protected by Title VII and the other discrimination statutes, and will seek to vindicate those interests with maximum vigor.

109 F.3d at 361-62.

In reaching these highly-subjective conclusions, the court conceded that it had ignored "the precedents," because the parties' briefs had attempted such an analysis, "but in doing so all they have done is identify a circuit split" between *Austin* and *Varner v. National Super Markets, Inc.*, 94 F.3d 1209, 1213 (8th Cir. 1996).[26] The court recognized that *Gilmer* had drawn distinctions from *Alexander* when it could, and perhaps should, have simply recognized that the societal conditions which produced *Alexander* no longer compelled a no-deference result.

> The conservative reading of *Gilmer* is that it just pruned some dicta from *Alexander* — and it certainly cannot be taken to hold that collective bargaining agreements can compel the arbitration of statutory rights. The issue was not before the court or discussed by it. At the very most the Court may have so distinguished *Alexander* as to deprive it of any authoritative force; but that is the most it did and by doing so opened what till then had been a closed issue.

109 F.3d at 365.

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[26] *Varner* held, with only perfunctory discussion, that the *Alexander* rationale "applies to a plaintiff who has chosen not to participate in the grievance procedure," because the statutory prerequisites to suit "do not include exhaustion of grievance procedures under a CBA." The same court had earlier said it would neither "defer to . . . , nor give any weight" to an arbitration award adverse to a Title VII plaintiff, again relying solely in *Alexander*. *Stacks v. Southeastern Bell Yellow Pages, Inc.*, 27 F.3d 1316, 1326 n.3 (8th Cir. 1994). With respect, this analysis fails to address the issues presented here, and presents no true "circuit split."

Pryner is less significant for the compelling nature of its reasoning than it is for the only real holding it makes:

> the union cannot consent *for* the employee by signing a collective bargaining agreement that consigns the enforcement of statutory rights to the union-controlled grievance and arbitration machinery created by the contract.

The handful of appellate decisions which have endorsed Judge Posner's opinion in *Pryner* have added little to the analysis. *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437 (10th Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3137 (Aug. 6, 1997), arose on appeal from a jury verdict in favor of a sexual harassment plaintiff on her tort claims but adverse to her allegations under Title VII. The employer's cross-appeal contended that *Austin* deprived the court of jurisdiction over plaintiff's federal claims. Since the court of appeals reversed the Title VII verdict, it was necessary to address the cross-appeal, relying on *Varner*,[27] three pre-*Austin* decisions[28] and a law review article[29] to "adopt the majority view," 112 F.3d at 1453. But a glaring omission in the appellate record renders the entire discussion of this subject in *Harrison* as little more than an academic exercise: the court noted that it did

> not have access to the CBA between Potash and plaintiff's union and therefore do not know what the arbitration clause encompasses. However, there is no indication in Potash's appellate brief that

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[27] *Varner v. National Super Markets*, 94 F.3d 1209 (8th Cir. 1996), *cert. denied*, ___ U.S. ___, 117 S. Ct. 946, 136 L. Ed. 2d 835 (1997) (discussed *supra*. n.26).

[28] *Tran v. Tran*, 54 F.3d 115, 117 (2d Cir. 1995), *cert. denied*, ___ U.S. ___ (1996); *Bintner v. Burlington Northern* 857 F. Supp. 1484, 1488 (D. Wyo. 1994); *Randolph v. Cooper Industries*, 879 F. Supp. 518, 521 (W.D. Pa. 1994).

[29] Malin, "*Arbitrating Statutory Employment Claims in the Aftermath of Gilmer*," 40 St. Louis U.L.J. 77, 84, 87 (1996).

> plaintiff's union agreed to arbitrate its members' statutory claims.

112 F.3d at 1454 n.2.

The so-called "*Pryner* line of cases" provides a short list of grounds for judicial challenge to the results reached in *Austin*.[30] They can be summarized as follows:

(a) *Austin* is inapplicable where the plaintiff presents "a colorable argument that the arbitration mechanism has failed." *Smith v. United Parcel Serv.*, 947 F. Supp. 190, 194 n.11 (D. Md. 1996). *See also Brisentine v. Stone & Webster Engineering Corp.*, 117 F.3d 519, 525 (11th Cir. 1997); *Bynes v. Ahrenkiel Ship Mgmt. (U.S.), Inc.*, 944 F. Supp. 485, 487 (W.D. La. 1996); *Lynch v. Pathmark Supermarkets*, 987 F. Supp. 236, 242 (S.D.N.Y. 1997) (following arbitration award adverse to plaintiff who had "a long history of mutual antagonism with coworkers").

(b) That the collective bargaining agreement did not specifically cover statutory claims or the precise issue presented in the discrimination action case as it was filed in court. *Brown v. Trans World Airlines*, 127 F.3d 337 (4th Cir. 1997); *Bush v. Carrier Air Conditioning*, 940 F. Supp 1040 (E.D. Tex. 1996); *Scarborough v. Brown Group, Inc.*, 972 F. Supp. 1112 (W.D. Tenn. 1997); *Nichols v. General Motors Co.*, 978 F. Supp. 743 (S.D. Ohio 1997); *LaChance v. Northeast Publishing, Inc.*, 965 F. Supp. 177 (D. Mass. 1997); *Loftis v. Brown & Williamson Tobacco Corp.*, 73 FEP Cas. 1754 (M.D. N.C. 1997); *Cosely v. E.I. DuPont de Nemours & Co.*, 1997 U.S. Dist. Lexis 22509 (E.D. Va. July 24, 1997), *aff'd mem.*, 139 F.3d 888 (4th Cir. 1998); *Glickstein v. Neshaminy Sch. Dist.*, 156 L.R.R.M. 2706, 72 EPD ¶45,126 (E.D. Pa. 1997); *Coleman v. Houston Lighting & Power Co.*, 984 F. Supp. 576 (S.D. Tex. 1997); *Testerman v. Chrysler Corp.*, 1997 U.S. Dist. Lexis 21392 (D. Del. Dec. 30, 1997) *and see Albertson's, Inc. v. United Food & Commercial Workers*, 1997 U.S. Dist. Lexis 4554 (D. Ida. Mar. 10, 1997) (FLSA claims);

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[30] For a larger enumeration, *see* Bales, "*Creating and Challenging Compulsory Arbitration Agreements*," 13 Lab. Law. 511 (1998).

Abendschein v. Montgomery County, 984 F. Supp. 356 (D. Md. 1997) (same).

(c) That *Austin* is of no effect if the contract expressly forbids employees "to demand arbitration" or "to institute any action based upon this Agreement for wrongful discharge or because of any breach of this Agreement." *Bynes v. Ahrenkiel Ship Mgmt. (U.S.), Inc.*, 944 F. Supp. 485, 486 (W.D. La. 1996). *And see Krahel v. Owens – Brockway Glass Container, Inc.*, 971 F. Supp. 440, 451-52 (D. Ore. 1997); *Dalton v. Jefferson Smurfit Corp.*, 979 F. Supp. 1187 (S.D. Ohio 1997); *Glickstein v. Neshaminy Sch. Dist.*, 156 L.R.R.M. 2706, 72 EPD ¶45,126 (E.D. Pa. 1997); *Coleman v. Houston Lighting & Power Co.*, 984 F. Supp. 586 (S.D. Tex. 1997); *cf.*, *Phox v. Allied Capital Advisers, Inc.*, 74 FEP Cas. 809 (D. D.C. 1997) (*Austin* inapplicable where employee cannot demand arbitration).

(d) That, irrespective of contract language, agreements to arbitrate statutory claims under a collective bargaining agreement are "invalid" because "a union may not waive an employee's right under Title VII to bring a claim in federal court," *Bush v. Carrier Air Conditioning*, 940 F. Supp. 1040, 1043 (E.D. Tex. 1996), (N.D. Tex. 1996), at least without that employee's "individual consent," *Bynes v. Ahrenkiel Ship Mgmt. (U.S.) Inc.*, 944 F. Supp. 485 (W.D. La. 1996). *See also Buckley v. Gallo Sales Co.*, 949 F. Supp. 737 (N.D. Cal. 1996); *Hill v. American Can Co.*, 952 F. Supp. 398 (N.D. Tex. 1996); *Araiza v. National Steel & Ship Bldg. Co.*, 973 F. Supp. 963 (S.D. Cal. 1997); *Chopra v. Display Producers, Inc.*, 980 F. Supp. 714 (S.D.N.Y. 1997); *Davis v. Houston Lighting & Power*, 990 F. Supp. 515 (S.D. Tex. 1998). *But compare*, *Martin v. Dana Corp.*, 150 L.R.R.M. 2117 (E.D. Pa. 1994) (dismissing 29 U.S.C. § 185 claim but retaining Title VII claim), *aff'd*, 155 L.R.R.M. 2523, 73 FEP Cas. 1803, 134 Lab. Cas. ¶10,015 (3d Cir.) (affirming dismissal of Title VII claim for failure to exhaust grievance procedure, where collective bargaining agreement gave individual the right to prosecute grievance), *withdrawn*, 114 F.3d 421 (pending *en banc* resolution), *vac. mem.*, 124 F.3d 590, *reversed mem. on panel rehearing*, 135 F.3d 765 (1997).

(e) That a prior arbitration decision, whether favorable to the employer[31] or to the employee,[32] does not bar judicial resolution of the claim even if it is arguably identical to the issue which had been arbitrated.

Finally, a number of opinions simply chose the reasoning of the "*Pryner* line" over that of *Austin*, without any significant amplification of the specific factors deemed controlling, or by a recitation and application of all three of the "distinguishing factors" identified in *Gilmer*, *see Penny v. United Parcel Service*, 128 F.3d 408, 413-414 (6th Cir. 1997); *Johnson v. Bodine Elec. Co.*, __ F.3d __, 157 L.R.R.M. 2897, 76 FEP Cas. 744 (7th Cir. 1998); *Gray v. Toshiba American Consumer Prods., Inc.*, 959 F. Supp. 805 (M.D. Tenn. 1997); *Nieves v. Individualized Shirts*, 961 F. Supp. 782 (D. N.J. 1997); *Kirkendall v. United Parcel Serv., Inc.*, 964 F. Supp. 106 (W.D.N.Y. 1997); *Vargas v. Gromko*, 977 F. Supp. 996 (N.D. Cal. 1997); *Mellody v. Upper Merion Area Sch. Dist.*, 157 L.R.R.M. 2401 (E.D. Pa. 1998).

Arguments (a) through (c) are fact-specific, and hinge upon the language of the agreement and the facts presented in an individual case. Wright presents no argument that "the arbitration mechanism has failed"; the provisions of the SCSA-Local 1422 agreement permit arbitration of "matters under dispute;" the agreement covers "all matters affecting wages, hours and other terms and conditions of employment;" the agreement is intended not to "be violative of any Federal or State law" [Agreement, ¶¶15(B), 15(F), 17, J.A. 43a, 45a-46a, 47a], thereby rendering an issue concerning "qualifications" to be arbitrable and requiring an arbitrator to apply legal definitions derived from the ADA; and the agreement does not prohibit the assertion of claims of or by individuals.

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[31] *Breech v. Alabama Power Co.*, 962 F. Supp. 1447, 1454-55 (S.D. Ala. 1997), *aff'd mem.*, 140 F.3d 1043 (11th Cir. 1998); *Vargas v. Gromko*, 977 F. Supp. 996 (N.D. Cal. 1997); *Lynch v. Pathmark Supermarkets*, 987 F. Supp. 236 (S.D.N.Y. 1997); *Testerman v. Chrysler Corp.*, 1997 U.S. Dist. Lexis 21392 (D. Del. Dec. 30, 1997).

[32] *Bush v. Carrier Air Conditioning*, 940 F. Supp. 1040 (E.D. Tex. 1996) (first grievance was arbitrated; issue arose over second grievance contending that refusal to comply with arbitration award was retaliatory).

Likewise, since no arbitration has taken place, the fact pattern of alternative (e) is not here. That only leaves the issue of whether an individual's consent to arbitrate can be provided by his exclusive representation, or whether instead only an individual is capable of making such an agreement. The discussion elsewhere in this Brief is, it is submitted, convincing that a collective bargaining representative not only can, but must, be willing to represent those it has won the right to represent when they believe themselves to be the victims of employment discrimination.[33]

V. PETITIONER HAS FAILED TO PROVE A LEGISLATIVE INTENT TO PRECLUDE ARBITRATION

Petitioner's arguments regarding legislative intent are little more than a condensation of the Ninth Circuit's view on the subject. Therefore, it seems appropriate to consider the reasoning process employed by that Court in reaching results which are, at the very least, controversial.

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[33] For authorities favoring arbitration of ADA and other statutory discrimination claims, *see inter alia*, Cole, "*A Funny Thing Happened on the Way to the (Alternative) Forum: Reexamining Alexander v. Gardner-Denver in the Wake of Gilmer v. Interstate/Johnson Lane Corp.*," 1997. B.Y.U.L. Rev. 591 (1997); Keene, "*Collective Bargaining and Compulsory Arbitration of Americans With Disabilities Act Claims*," 48 Lab. L.J. 738 (1997); Note, "*Compulsory Arbitration in the Unionized Workplace: Reconciling Gilmer, Gardner-Denver and the Americans With Disabilities Act*," 37 B.C. L. Rev. 479 (1996); Comment, "*Arbitrating Statutory Rights in the Union Setting: Breaking the Collective Interest Problem Without Damaging Labor Relations*," 654 U. Chi. L. Rev. 225 (1998); Estreicher, "*Predispute Agreements to Arbitrate Statutory Employment Claims*," 72 N.Y. U.L. Rev. 1344 (1997); *and compare*, Hodges, "*Mediation and the Americans with Disabilities Act*," 30 Ga. L. Rev. 431 (1996). *But see* Coleman & Vasquez, "*Mandatory Arbitration of Statutory Issues Under Collective Bargaining: Austin and its Progeny*," 48 Lab. L.J. 703 (1997); Kelly, "*An Argument for Retaining the Well Established Distinction Between Contractual and Statutory Claims in Labor Arbitration*," 75 U. Det. Mercy L. Rev. 1 (1997).

No jurisdiction in the United States has produced more exceptions to *Gilmer* than the Ninth Circuit.[34] While that court's recent decision in *Duffield v. Robertson Stephens & Co.*, __ F.3d __, 76 FEP Cas. 1450 (9th Cir. 1998) is the farthest departure from the *Gilmer* rationale, it ranges over the entire landscape of the arguments detailed above, plus a few thrown in for good measure. Among those is the legislative intent question: *Duffield* holds that an employer cannot require, as a mandatory condition of employment, that all employees waive "their right to bring Title VII . . . claims in court and instead agree in advance to submit all employment related disputes to binding arbitration." __ F.3d at __, 76 FEP Cas. at 1456, concluding that the plaintiff in that case "met her burden of showing that Congress intended in enacting the Civil Rights Act of 1991 to preclude the compulsory arbitration of Title VII disputes." __ F.3d at __, 76 FEP Cas. at 1466. *But compare*, *Mago v. Shearson Lehman Hutton, Inc.*, 956 F.2d 932 (9th Cir. 1992) (plaintiff failed to prove intent to preclude arbitration of Title VII claims).

Duffield refers to the Ninth Circuit's earlier decision in *Prudential Insurance Company v. Lai*, 42 F.3d 1299 (1994), *cert. denied*, 516 U.S. 812 (1995), which described the pre-*Gilmer* view: " '[*Gardner-Denver*] was widely interpreted as prohibiting any form of compulsory arbitration of Title VII claims.' " *Lai*, 42 F.3d at 1303, quoted in *Duffield*, __ F.3d at __, 76 FEP Cas. at 1454. Once that interpretation had been dispelled by *Gilmer*, a party (or a court) which wishes to avoid arbitration has a daunting task:

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[34] *See generally*, *Prudential Insurance Co. v. Lai*, 42 F.3d 1299 (9th Cir. 1994), *cert. denied*, 516 U.S. 812 (1995) (agreement to arbitrate is unenforceable unless "knowingly" entered into). *And see Renteria v. Prudential Ins. Co.*, 113 F.3d 1104 (9th Cir. 1997); *but compare Seus v. John Nuveen & Co.*, __ F.3d __ (3d. Cir. June 8, 1998), *contra*. Conversely, however, that court declines to permit a plaintiff who "voluntarily initiates binding arbitration" of a statutory claim to disregard the arbitrator's award by presenting the claim in a subsequent action under Title VII. *Nghiem v. NEC Electronic, Inc.*, 25 F.3d 1437, 1439-40 (9th Cir.), *cert. denied*, 513 U.S. 1044 (1994). Such a holding is an express rejection of the heart of *Alexander*.

> In the post-*Gilmer* era, if courts are to hold that an act precludes arbitration of claims to which it gives rise, a more concrete showing is required, including a scrupulous examination of Congress' actions and intent. Further, in examining congressional legislation, it is now incumbent upon courts to consider whether Congress intended to preclude every form of arbitration of claims arising under a particular statute, or whether it intended to preclude only certain forms of arbitration agreements.

__ F.3d at __, 76 FEP Cas. at 1455.

The fallacy inherent in the *Duffield* analysis is demonstrated by its repeated assertion that "compulsory arbitration" — defined by the court as

> the system under which employers compel their prospective employees as a condition of employment to waive their rights to litigate future employment-related claims in a judicial forum,

as distinguished from "systems under which employees agree, or otherwise elect, after disputes have arisen to submit them to arbitration," as well as

> agreements in which at the time of hiring employers give prospective employees the choice to opt in advance for arbitration of all future employment related disputes or for retention of their statutory right to litigate such disputes

__ F.3d at __, 76 FEP Cas. at 1453 — is irreconcilable with a "knowing and voluntary" decision by the individual to "waive" resort to the courts. These premises are untenable.

The second of the three procedures defined by the *Duffield* court — election to arbitrate an existing dispute — is nothing more than a return to common law or, more accurately, common sense. Parties may always settle, litigate, or engage in any variety of dispute resolution procedures unless the claim is of the rare category in which such resolution is statutorily prohibited. Included in the category of claims which cannot be settled without third-party approval are minimum wage or overtime claims under the Fair Labor Standards Act, *see* 29 U.S.C. § 216(c).[35] That type of issue is, of course, that which produced this Court's decision in *Barrentine*.[36] No similar impediment exists here.

Nor is the third "option" supportable by legislative or judicial authority. *Duffield* says that

> [a]fter the Supreme Court granted certiorari in *Gilmer*, Congress amended the ADEA to provide that all waivers of rights under the Act, apparently including the right to jury trial, 29 U.S.C. §626(c), must be "knowing and voluntary."

__ F.3d at __, n.5, 76 FEP Cas. at 1456, n.5. This is simply untrue. The legislation referred to, the Older Workers Benefit Protection Act of 1990, 29 U.S.C. § 626(f)(1), provides requirements for *releases* of *claims* under the ADEA, and this Court's analysis of the OWBPA in *Oubre v. Entergy Operations, Inc.*, __ U.S. __, 118 S. Ct. 838, 139 L. Ed. 2d 849 (1998); deals only with releases, not with forum choices. *Cf., Adams v. Philip Morris, Inc.*, 67 F.3d 580 (6th Cir. 1996) (agreement to release a claim); *see Seus v. John Nuveen & Co.*, __ F.3d __ (3d Cir. June 8, 1998) (OWBPA applies to any "waiver of any rights or claim" under the ADEA, but not to a predispute agreement to arbitrate ADEA claims.) The third "option" is, therefore, only an immaterial permutation of the second, in which the employee may elect to arbitrate or not after the dispute arises, with the choice afforded by contract rather than by common sense.

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[35] The Secretary of Labor's authority to "supervise" the payment of unpaid wages or overtime has been interpreted as rendering unsupervised waivers or settlements unenforceable, and a settlement for less than the full amount of the claim is of no effect. *D.A. Schulte, Inc. v. Gangi*, 328 U.S. 108 (1946).

[36] *And see Iowa Beef Packers, Inc. v. Thompson*, 405 U.S. 228 (1972) (before *Barrentine*, employees needed to exhaust union contract procedures prior to filing suit under FLSA).

Having demonstrated a predisposition against "compulsory arbitration" and, perforce, a fundamental disagreement with *Gilmer*, the *Duffield* court then proceeded to cobble together a lopsided version of the legislative history of the Civil Rights Act of 1991. Conceding the genesis of Section 118 of that statute in the identical language of two laws passed the previous year — Section 513 of the ADA and Section 18 of the vetoed Civil Rights Act of 1990,[37] the court, after leveling extended but "respectful" criticism at the Fourth Circuit, referred to observations of an individual legislator to the effect that Section 18 was "intended to be consistent with . . . *Gardner-Denver*," with "[n]o approval whatsoever [being] intended of the Supreme Court's recent decision in *Gilmer*" (__ F.3d at __, 76 FEP Cas. at 1461-62, *quoting* Representative Edwards, 137 Cong. Rec. H9530 (daily ed. Nov. 7, 1991)). In so doing, the Ninth Circuit panel simply overlooked the section-by-section analysis presented by Senator Dole eight days earlier, at the time of the Senate's adoption of the bill:

> This provision encourages the use of alternative means of dispute resolution, including binding arbitration, where the parties knowingly and voluntarily elect to use these methods.
>
> In light of the litigation crisis facing this country and the increasing sophistication and reliability of alternatives to litigation, there is no reason to disfavor the use of such forums. *See Gilmer v. Interstate / Johnson Lane Corp.*, 111 S.Ct. 1647 (1991).

137 CONG. REC. S. 15478 (daily ed. Oct. 30, 1991).

The Third Circuit has an opposing view. In *Seus v. John Nuveen & Co.*, __ F.3d __, 1998 U.S. App. Lexis 11907 (June 8, 1998), Judge Stapleton spoke for a unanimous panel when he stated:

> The EEOC argues . . .that a Congressional intent to preclude predispute waivers of a judicial forum . . . can be discerned in the legislative history of §118

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[37] __ F.3d at __, n.10, __, 76 FEP Cas. at 1457, n.10, 1460-61.

> [of the Civil Rights Act of 1991]. The EEOC points to two comments by the House Committee on Education and Labor as well as two remarks of individual legislators on the floor to support its position. In our judgment, however, no amount of commentary from individual legislators or committees would justify a court in reaching the result the EEOC would have us reach.

As such, therefore, the court in *Seus* said, "we respectfully disagree with . . . *Duffield*. . . ."[38]

What, then, are we to make of this legislative history? Selective quotations, both out of and within the context of their "presentation,"[39] are at best ambiguous, conjuring up Justice Frankfurter's puckish remark in *Greenwood v. United States*, 350 U.S. 366, 374 (1956): "[T]his is a case for applying the canon of construction of the wag who said, when the legislative history is doubtful, go to the statute."

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[38] Nor does the Third Circuit stand alone. EEOC has had a dress-rehearsal of its legislative history argument across the nation; only the Ninth Circuit and one federal district judge seem persuaded by it. EEOC's position is rejected, in addition to *Seus*, in *EEOC v. Frank's Nursery & Crafts, Inc.*, 966 F. Supp. 500, 503 (E.D. Mich. 1997), and *Hooters of America, Inc. v. Phillips*, 76 FEP Cas. 1757 (D.S.C. 1998); *compare Kiernan v. Piper Jaffray Cos.*, 137 F.3d 588 (8th Cir. 1998). The contrary view is found in *Duffield* and in *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* 76 FEP Cas. 681 (D. Mass. 1998), (Gertner, J.) and *LaChance v. Northeast Publishing, Inc.*, 965 F. Supp. 177, 187 (D. Mass. 1997) (Gertner, J.) (relying on two pre-*Austin* decisions). *And see*, *Krahel v. Owens-Brockway Glass Container, Inc.*, 971 F. Supp. 440, 447 (D. Ore. 1997) ("Congress clearly knew how to" overrule *Alexander*, but did not do so.)

[39] Much of the discussion of alternative dispute resolution is found in committee reports which are not explained in any actual legislative debate, a process described by Judge Gesell in discussing the possible retroactivity of the Civil Rights Act of 1991: "The congressional 'debates' were, with few exceptions, hardly more than a series of declarations and counterdeclarations. . . ." *Van Meter v. Barr*, 778 F. Supp. 83, 84 (D.D.C. 1991) (applying "manifest intention of legislature" test), *app. dism'd*, 976 F.2d 1 (D.C. Cir. 1992).

When the identical language of the two statutes, as well as that of the 1990 Civil Rights Act, is considered in a vacuum, legislative intent continues to be elusive. What is clear, however, is that this Court's direction in *Gilmer*, borrowed from *Mitsubishi* and *McMahon*, must be, and has not been, met by the petitioner: "the burden is on [one who seeks to avoid arbitration] to show that Congress *intended to preclude* a waiver of a judicial forum for [discrimination] claims." *Gilmer*, 500 U.S. at 26, *quoting McMahon*, 482 U.S. at 227.

Nothing in the text or legislative history of the ADA and the 1991 Act "explicitly precludes arbitration." Compulsory arbitration of ADA claims pursuant to an arbitration agreement is no more "inconsistent with the statutory framework and purposes" than was the case in *Gilmer*, 500 U.S. at 26-27. Rather, the post-*Gilmer* enactment of Section 118 of the Civil Rights Act of 1991 and the pre-*Gilmer* adoption of the identically-worded ADA Section 513,[40] neither of which applied to the ADEA provisions analyzed in *Gilmer*, buttressed the view that, *at the least*, Congress had a more positive outlook toward arbitration under those two statutes than it had enjoyed when the ADEA was enacted seven years before *Alexander* and twenty-four years before *Gilmer*. Respondents have no burden of proof on this issue, and the contentions of Petitioner and his *amici* regarding legislative intent remain unproved.

VI. "WAIVER" — NOT OF RIGHTS, BUT OF FORUM.

Whence, then, comes the mischievous word "waiver," which so often carries with it the catch phrase "knowing and intelligent"? Its source is *Alexander*, where Justice Powell used the word in only two contexts: in footnote 10 ("The policy reasons for rejecting the doctrines of election of remedies *and waiver* in the context of Title VII are equally applicable to the doctrines of *res judicata* and *collateral estoppel*," 415 U.S. at 49 n.10), and in the discussion beginning at 415 U.S. 51:

> To begin, we think it clear that there can be no prospective waiver of an employee's rights under Title VII. It is true, of course, that a union may waive certain statutory rights related to collective activity, such as the right to strike. [Citations omitted.] These rights are conferred on employees collectively to foster the processes of bargaining . . . Title VII, on the other hand, stands on a plainly different ground: it concerns not majoritarian processes, but an individual's right to equal employment opportunities. . . . Of necessity, the rights conferred can form no part of the collective bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII. In these circumstances, an employee's rights under Title VII are not susceptible to prospective waiver. *See Wilko v. Swan*, 346 U.S. 427 (1953).
>
> The actual submission of petitioner's grievance to arbitration in the present case does not alter the situation. Although presumably an employee may waive his cause of action under Title VII as part of a voluntary settlement,* mere resort to the arbitral forum constitutes no such waiver. Since an employee's rights under Title VII may not be waived prospectively, existing contractual rights and remedies against discrimination must result from other concessions already made by the union as part of the union's bargain struck with the employer.

415 U.S. at 51-52. Footnote 15 of *Alexander*, referring to the above-quoted text at the point of the inserted asterisk, goes on to hypothesize,

> In this case petitioner and respondent did not enter into a voluntary settlement expressly conditioned

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[40] Pub. L. 101-336, Title V, § 513, July 26, 1990, 104 Stat. 377, *codified as* 42 U.S.C. § 12212:

> When appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, fact finding, minitrials, and arbitration, is encouraged to resolve disputes arising under this chapter.

> on waiver of petitioner's cause of action under Title VII. In determining the effectiveness of any such waiver, a court would have to determine at the outset that the employee's consent to the settlement was voluntary and knowing. In no event can the submission of a claim under the nondiscrimination clause of the collective bargaining agreement constitute a binding waiver with respect to an employee's rights under Title VII.

However, the explanation furnished in *Gilmer* serves to eliminate the precedential weight of virtually all of the *Alexander* "waiver" discussion:

> [B]y agreeing to arbitrate a statutory claim, [a party] does not forego the substantive rights afforded by the statute; [it] only submits to their resolution in an arbitral, rather than a judicial, forum.

Gilmer, 500 U.S. at 26; *and see Johnson v. Hubbard Broadcasting, Inc.*, 73 FEP Cas. 8, 17 (D. Minn. 1996) ("an arbitration agreement generally serves only as a specialized choice-of-forum provision which identifies the 'situs of the suit' and the specific set of procedures governing its resolution"). Once this is understood, the discussion regarding who makes the agreed upon forum choice — an individual or representative of that individual — has no logical force.

CONCLUSION

A party cannot be required to arbitrate a dispute unless it has agreed to do so. *Air Line Pilots Ass'n v. Miller*, __ U.S. __, 118 S. Ct. 1761, 140 L. Ed. 2d 1070 (May 26, 1998); *Brown v. Trans World Airlines*, 127 F.3d 337 (4th Cir. 1997). But the public policy favoring dispute resolution by means other than litigation, whether derived from the FAA, the LMRA, or some other source, requires that doubts regarding arbitrability be resolved by the courts by affording the arbitrator an opportunity to adjudicate these issues which fairly can be said to be contemplated in the parties' agreement. Once that step has taken place, the procedures and standards to be followed by the arbitrator and in post-arbitral judicial review will

be ripe for definition. *See, e.g.* Gorman, "*The Gilmer Decision and the Private Arbitration of Public Law Disputes*", 1995 U. Ill. L. Rev. 635 (1995); Icenogle & Shearer, "*Emerging Due Process Standards in Arbitration of Employment Discrimination Disputes: New Challenges for Employers,*" 48 Lab. L.J. 81 (1997); *Cole v. Burns International Security Servs.*, 105 F.3d 1465 (D.C.Cir. 1997). In the posture of this case, however, such instruction would wander far afield from the issues properly before this Court. Likewise, what recourse may or may not be available to Petitioner, given the actions taken and not taken below, is a matter best left to other days and other forums. The decision below should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX A — RELEVANT STATUTES

> Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitrations, is encouraged to resolve disputes arising under the Acts amended by this Act.

Civil Rights Act of 1990, § 18 passed October 16, 1990 (Senate), October 17, 1990 (House), vetoed October 24, 1990.

> Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitrations, is encouraged to resolve disputes arising under this Chapter.

Pub. L. 101-336, Title V, § 513, July 26, 1990, 104 Stat. 377, 42 U.S.C. § 12212.

> Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitrations, is encouraged to resolve disputes arising under the Acts or provisions of Federal Law amended by this Title.

Pub. L. 102-166, § 118, Nov. 21, 1991, 105 Stat. 1071, 1081, 42 U.S.C. § 1981 note.

No. 97-889 (19)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

CEASAR WRIGHT,
Petitioner,
v.
UNIVERSAL MARITIME SERVICE CORP., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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30 pp

TABLE OF CONTENTS

Page

Table of Authorities iii

Further Statement of Facts 1

Summary of Argument 1

ARGUMENT --

I. Applying *stare decisis, Alexander v. Gardner-Denver* requires that the judgment below be reversed 3

A. The ADA incorporated the enforcement statute construed in *Alexander*, and Congress has enacted no change affecting *Alexander* 4

B. *Alexander* held that resort to contractual grievance procedures was not a jurisdictional precondition to a suit on a federal statutory discrimination claim 5

1. The courts below enforced a rule of preclusion, not of "exhaustion of remedies" 8

2. Even if exhaustion were required, Petitioner did everything necessary to exhaust remedies through the union, and the respondents did not contend otherwise below 8

Table of Contents (continued)

Page

3. *Alexander* also established that rights under Title VII and related employment discrimination statutes are not proper for "deferral" to arbitration 10

C. *Stare decisis* also compels the conclusion that a "general arbitration clause" in a collective bargaining agreement does not cover employees' claims under statutes that protect employees as individuals 12

II. Overruling *Alexander* would undermine the ADA's deterrent purpose of avoiding harm by making it more difficult for individual victims of discrimination to obtain remedies against employers that discriminate 15

Conclusion 20

TABLE OF AUTHORITIES

Page

Cases:

Air Line Pilots Ass'n v. Miller,
__ U.S. __, 118 S. Ct. 1761 (1998) 9n, 12, 18n

Alexander v. Gardner-Denver,
415 U.S. 36 (1974) . . . . *passim*

Austin v. Owens-Brockway Glass Container, Inc.,
78 F.3d 875 (4th Cir.), *cert. denied*,
__ U.S. __, 117 S. Ct. 432 (1996) 8, 18

Barrentine v. Arkansas-Best Freight Systems, Inc.,
450 U.S. 728 (1981) 6n, 11, 13, 20

Black-Clawson Co., Inc. v. International Ass'n of Mach.,
313 F.2d 179 (2d Cir. 1962) 9n

Bowen v. United States Postal Serv.
459 U.S. 212 (1983) 16n

Bright v. Norshipco.,
951 F. Supp. 95 (E.D. Va. 1997), *aff'd*,
133 F.3d 913 (4th Cir. 1998) (table) 19n

Burlington Industries, Inc. v. Ellerth,
__ U.S. __, 118 S. Ct. 2257 (1998) . . . . *passim*

Cruz v. Local Union No. 3, IBEW,
34 F.3d 1148 (2d Cir. 1994) 9n

Dole v. Steelworkers,
494 U.S. 26 (1990) 5n

Table of Authorities (continued)

Page

Cases (continued):

Duffield v. Robertson Stephens & Co.,
__ F.3d __, 76 FEP Cas. 1450 (9th Cir. May 8, 1998) 16n-17n

Electrical Workers v. Robbins & Myers, Inc.
429 U.S. 299 (1976) 6

Emporium-Capwell Co. v. Western Addition Community Org., 420 U.S. 50 (1975) 9n

Faragher v. City of Boca Raton,
__ U.S. __, 118 S. Ct. 2275 (1998) . . . . *passim*

Gateway Coal Co. v. United Mine Workers of America,
414 U.S. 368 (1974) 11n

Gilmer v. Interstate/Johnson Lane Corp.,
500 U.S. 20 (1991) . . . . *passim*

Hammontree v. NLRB,
925 F.2d 1486 (D.C. Cir. 1991) 11, 12, 14

Hampton v. Kroger Co.,
1996 WL 560306, 1996 U.S. Dist. LEXIS 14407 (W.D. Va. Sept. 27, 1996) 19n

Hawaiian Airlines, Inc. v. Norris,
512 U.S. 246 (1994) 14

Hooters of America, Inc. v. Phillips,
76 FEP Cas. 1757 (D.S.C. March 12, 1998) 17n

Table of Authorities (continued)

Page

Cases (continued):

Illinois Brick Co. v. Illinois,
431 U.S. 720 (1977) 4

Jarecki v. G.D. Searle & Co.,
367 U.S. 303 (1961) 5n

Johnson v. Circuit City Stores, Inc.,
__ F.3d __, 77 FEP Cas. 139 (4th Cir. July 1, 1998) 17n

Krahel v. Owens-Brockway Glass Container, Inc.,
971 F. Supp. 440 (D. Ore. 1997) 17n

Landgraf v. USI Film Prods.,
511 U.S. 244 (1994) 5

Livadas v. Bradshaw,
512 U.S. 107 (1994) 14

Love v. Pullman Co.,
404 U.S. 522 (1972) 10

McDonald v. City of West Branch,
466 U.S. 284 (1984) 6n, 20

Meritor Savings Bank FSB v. Vinson,
477 U.S. 57 (1986) 1-2

Moore v. Duke Power Co.,
971 F. Supp. 978 (W.D.N.C. 1997) 18, 19

Table of Authorities (continued)

Page

Cases (continued):

Patsy v. Board of Regents of Fla.,
457 U.S. 496 (1982) 18n

Pryner v. Tractor Supply Co.,
109 F.3d 354 (7th Cir.), *cert. denied*,
___ U.S. ___, 118 S. Ct. 294 (1997) 16

Republic Steel Corp. v. Maddox,
379 U.S. 650 (1965) 9

Third Nat'l Bank v. Impac Limited, Inc.,
432 U.S. 312 (1977) 5n

Turner v. Bell Atlantic-Virginia, Inc.,
1997 WL 687707, 1997 U.S. Dist. LEXIS
11192 (W.D. Va. May 5, 1997) 19n

United Paperworkers Inter. Union v. Misco, Inc.,
484 U.S. 29 (1987) 14

United Technologies Corp.,
268 N.L.R.B. 557 (1984) 12

W.R. Grace & Co. v. Local 759,
461 U.S. 757 (1983) 14

Wright v. Over-the-Road & City Transfer Drivers, Inc.,
etc., 945 S.W.2d 48 (Mo. App. 1997) 17n

Zipes v. Trans World Airlines, Inc.,
455 U.S. 522 (1972) 10

Table of Authorities (continued)

Page

Statutes:

29 U.S.C. § 159(a) 1, 10

29 U.S.C. § 143 .... 11n

42 U.S.C. § 2000e-4 4

42 U.S.C. § 2000e-5 4

42 U.S.C. § 2000e-6 4

42 U.S.C. § 2000e-8 4

42 U.S.C. § 2000e-9 4

42 U.S.C. § 12117(a) 4

42 U.S.C. § 12212 .... 5n

Civil Rights Act of 1991, 105 Stat. 1072 ...... 1, 4, 5n, 16

Labor Management Relations Act, 29 U.S.C.
§§ 171 *et seq.* 13, 14

Legislative Materials:

H.R. Rep. No. 102-40, pt. 1 (1991),
reprinted in 1991 U.S.C.C.A.N. 549 5

H.R. Rep. No. 101-485, pt. 3 (1990),
reprinted in 1990 U.S.C.C.A.N. 267 4

Table of Authorities (continued)

Page

Legislative Materials (continued):

137 Cong. Rec. S15472 (daily ed. Oct. 30, 1997) 5n

REPLY BRIEF FOR PETITIONER

FURTHER STATEMENT OF FACTS

Contrary to the assertions at pp. 1, 23 of respondents' brief, (1) respondents contended below and the courts below found that the union, rather than petitioner, had sole authority to file grievances and that the union made the decision not to file a formal grievance in January, 1995[1]; (2) respondents contended below that the time within which the grievance process was available to contest respondents' refusal to accept petitioner for work began on January 12, 1995, and had expired within 48 hours, more than ten days before petitioner was able to retain private counsel on January 26, JA 55a ¶ 23; and (3) respondents admitted below that when petitioner sent them notice of his claim of discrimination, none of the respondents offered to grieve these claims or to discuss the claims with him (*e.g.*, under 29 U.S.C. § 159(a)), *id.*

SUMMARY OF ARGUMENT

At the end of the Term just concluded, in *Burlington Industries, Inc. v. Ellerth*, ___ U.S. ___, 118 S. Ct. 2257 (1998), and *Faragher v. City of Boca Raton*, ___ U.S. ___, 118 S. Ct. 2275 (1998), this Court endorsed two propositions that are dispositive of this matter. First, the Court emphasized the importance of applying *stare decisis* in following prior decisions of this Court construing Title VII. Since Congress enumerated the decisions of this Court that it chose to modify in the Civil Rights Act of 1991, 105 Stat. 1072, the vitality of other rulings that it chose not to modify in the 1991 Act has been reinforced. As with the decision in *Meritor Savings Bank FSB v. Vinson*,

---

[1] The trial court found that, Pet. App. 16a, 18a: "Both parties agree that Plaintiff initially followed the proper procedure under the collective bargaining agreement for filing a grievance against Defendants. . . . For whatever reason, his union chose not to pursue his claim."

477 U.S. 57 (1986), explicated in *Ellerth* and *Faragher*, Congress made no changes to the rule of *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974); instead, Congress expressly endorsed the continuing vitality of *Alexander v. Gardner-Denver Co.*[2]

Respondents argue, disingenuously, that they seek only to require "exhaustion of remedies," that they only wish to have victims of discrimination use contractual remedies -- as workers must when seeking to enforce a contractual right -- *before* going to court. But respondents clearly expect the court to defer to the grievance-arbitration decision, so that "going to court" would be futile, except in those cases where the worker could show that the union had acted "perfunctorily or in bad faith." *See* Resp. Br. at 22-23.

The National Labor Relations Act, which the NLRB has construed to compel such deferral for exhaustion of remedies, was enacted to protect the collective rights of workers, not the individual rights that are protected in federal employment statutes. NLRB deferral, like *Gilmer*, assures that the worker will at least get a hearing -- procedural default is not allowed. But respondents and their *amici* have argued that this Court should affirm the procedural default *enforced* on petitioner by the courts below. Seeking to enforce this procedural default demonstrates with absolute clarity the lack of regard that respondents and their *amici* have for the employees' rights that Congress enacted in the Americans with Disabilities Act and other statutes prohibiting discrimination in employment.

Second, also in *Ellerth* and *Faragher*, this Court emphasized that the "primary objective" of employment discrimination statutes is "to influence primary conduct, . . . not to provide redress, but to avoid harm." *Faragher*, 118 S. Ct. at 2292. *Ellerth* and *Faragher* implement these policies by imposing consequences on employers: redress for concealed as well as obvious discrimination must be easily accessible to victims, or employers will sustain liability for the discrimination. These policies are designed to "serve Title VII's deterrent purpose." *Ellerth*, 118 S.Ct. at 2270.

Respondents and their *amici* seek to impose new and additional hurdles to the enforcement of rights under employment discrimination statutes with procedures that would shift from employers to unions the major burden of enforcing these statutes. As this Court clearly recognized in *Ellerth* and *Faragher*, any rule that shifts responsibility away from the employer will undermine the deterrent purpose of employment discrimination statutes. Any such rules are virtually guaranteed to promote forfeiture of rights, either by procedural default (as in petitioner's case) or because the costs of pursuing all meritorious claims are prohibitive for unions. Such forfeitures are antithetical to the principles of voluntary choice of *forum* that this Court applied in *Gilmer v. Interstate/Johnson Lane*, 500 U.S. 20 (1991).

ARGUMENT

I. Applying *stare decisis*, *Alexander v. Gardner-Denver Co.* requires that the judgment below be reversed.

Throughout this litigation, petitioner has relied on *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), which held that the rights established by employment discrimination statutes are independent of any rights conferred by contract, and that the grievance-arbitration mechanism of a collective bargaining agreement does not apply to statutory claims. Respondents tacitly recognize that if *Alexander* controls, they lose; they argue that "*Alexander*'s legacy has fulfilled the need which created it, and its limitations on the use of arbitration under collectively-bargained agreements should be updated and redefined" (Resp. Br. at 2-3). The U.S. Chamber of Commerce, *amicus curiae* supporting respondents, forthrightly recognizes that the issue is whether the Court should overrule *Alexander* (Br. at 2-3). Proper regard for *stare decisis* requires that *Alexander* be reaffirmed and the judgment below reversed.

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[2] Emphasis on *stare decisis* also focuses attention on the wide range of decisions in labor relations that respondents invite the Court to discard, in the guise of "updating" employment discrimination law in the unionized work place. *See* cases discussed *infra* pp. 12-15.

A. The ADA incorporated the enforcement statute construed in *Alexander*, and Congress has enacted no change affecting *Alexander*.

In the Americans with Disabilities Act (ADA), Congress adopted the entire statutory mechanism enacted in Title VII for administrative and judicial enforcement of the protections against employment discrimination. 42 U.S.C. § 12117(a), adopting enforcement provisions of 42 U.S.C. §§ 2000e-4, 2000e-5, 2000e-6, 2000e-8 and 2000e-9. Pet. App. 32a. When Congress enacted the ADA, the key Committee Report explicitly stated "that the approach articulated by the Supreme Court in *Alexander v. Gardner-Denver Co.* applies equally to the ADA." H.R. Rep. No.101-485, pt. 3, at 77 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 445, 500.

As this Court recently observed in *Ellerth*, 118 S.Ct. at 2270, quoting *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977), "we must bear in mind that considerations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation." In this case, as in *Ellerth* and in *Faragher* (118 S. Ct. at 2286):

> the force of precedent here is enhanced by Congress's amendment to the liability provisions of Title VII since the *Meritor* decision, without providing any modification of our holding.

In the Civil Rights Act of 1991, Congress explicitly addressed eight of this Court's decisions that had construed federal employment discrimination laws. Those decisions were clearly identified in the statute or the legislative history. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 250-51 (1994). Neither in the statute, nor in any of the legislative history, did Congress suggest that it intended to change the rule of *Alexander*; instead, the legislative history expressly stated that Congress understood that the amendments were "consistent with the Supreme Court's interpretation of Title VII in *Alexander v. Gardner-Denver Co.* . . ." H.R. Rep. No. 102-40, pt. 1, at 97 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 635.[3]

B. *Alexander* held that resort to contractual grievance procedures was not a jurisdictional precondition to a suit on a federal statutory discrimination claim.

Alexander clearly rejected the contention that use of the collective bargaining agreement grievance-arbitration procedures was jurisdictional, 415 U.S. at 47:

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[3] Any reasonable interpretation of the "ADR" Sections, 42 U.S.C. § 12212 and § 118 of the Civil Rights Act of 1991, must recognize that "alternative means of dispute resolution" would be "appropriate" only where adopted voluntarily, since every other ADR procedure listed will bind the parties only if they both accept the result *at the end of the procedure*: "settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials . . . ." As this Court stated in *Dole v. Steelworkers*, 494 U.S. 26, 36 (1990), "words grouped in a list should be given related meaning" (citations omitted); *see also Third Nat'l Bank v. Impac Limited, Inc.*, 432 U.S. 312, 322 n.16 (1977). Since "arbitration" is "a word . . . capable of many meanings," reference to the context is necessary "to avoid the giving of unintended breadth [here, compulsory arbitration] to the Acts of Congress." *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961). This reading of the statutory sections is confirmed by a "section-by-section analysis" of the 1991 Act "representing the views of the administration" and fourteen Republican Senators that was placed in the legislative record shortly before the Senate approved the measure. That analysis took note of this Court's then-recent decision in *Gilmer* but emphasized that "[t]his provision [§ 118 of the Act] encourages the use of alternative means of dispute resolution, including binding arbitration, *where the parties knowingly and voluntarily elect to use these methods*." 137 Cong. Rec. S15472, S15478 (daily ed. Oct. 30, 1997 (emphasis supplied). *Compare* Pet. Br. at 47-48.

> Title VII . . . specifies with precision the jurisdictional prerequisites that an individual must satisfy before he is entitled to institute a lawsuit. In the present case, these prerequisites were met when petitioner (1) filed timely a charge of employment discrimination with the Commission, and (2) received and acted upon the Commission's statutory notice of the right to sue. 42 USC § 2000e-5(b), (e), and (f).

Since the grievance process has no relation to jurisdiction, "an individual does not forfeit his private cause of action if he first pursues his grievance to final arbitration . . . ." 415 U.S. at 49. Under this statutory construction, the employee also does not forfeit his cause of action if he does not pursue his grievance at all. *See also Electrical Workers v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976) (pursuing contract grievance does not toll the statutory time limits for filing a charge of discrimination).[4]

In *Alexander*, this Court also emphatically declared that the bargaining representative had no role in compromising the individual workers' statutory rights, which are completely independent of the bargaining process. 415 U.S. at 51-52:

> Title VII's strictures are absolute and represent a congressional command that each employee be free from discriminatory practices. Of necessity, *the rights conferred can form no part of the collective-bargaining*

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[4] Because the language in *Alexander* is clear and explicit, and Congress has never modified the rule, the fact that Alexander's union submitted his contract claim to arbitration (as did the union in *McDonald v. City of West Branch*, 466 U.S. 284 (1984)) does not limit the application of *Alexander* solely to cases that have been submitted to grievance-arbitration, as respondents assert, Br. at 26. In *Barrentine v. Arkansas-Best Freight Systems, Inc.*, 450 U.S. 728, 731 n.6 (1981), several of the workers who prevailed in this Court had not submitted their claims to arbitration. See also cases cited in Pet. Br. at 18 n.6.

> *process* since waiver of these rights would defeat the paramount congressional purpose behind Title VII.
>
> * * * * *
>
> Since an employee's rights under Title VII may not be waived prospectively, *existing contractual rights and remedies against discrimination must result from other concessions already made by the union* as part of the economic bargain struck with the employer. [Emphasis supplied.]

The Court also rejected the argument that the district court should defer to the arbitral award, as respondents concede. Resp. Br. at 17. The Court found deferral inappropriate, *inter alia*, 415 U.S. 58 n.19, due to "the union's exclusive control over the manner and extent to which an individual grievance is presented . . . . [T]he interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit . . . . And a breach of the union's duty of fair representation may be difficult to establish." As discussed *infra* pp. 18-19, the cases show that a breach of the union's duty is *extraordinarily* difficult to establish.

No congressional action has called into question either of these holdings of *Alexander*: (1) that the statutory requirements for jurisdiction are exclusive, and do not include resort to the grievance-arbitration mechanism in a bargaining agreement,[5] so that neither exercising nor foregoing a grievance will forfeit statutory rights; and (2) that the statutory rights "form no part of the collective bargaining process," either in negotiation, or in adjustment of contract disputes, a process that must resolve conflicting interests of individual workers in the manner deemed best for the majority.

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[5] Nothing in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), suggests that use of a grievance or arbitration procedure is *jurisdictional*, or that *Gilmer*'s failure to demand arbitration resulted in forfeiture of his right to a hearing on the merits of his claim under the ADEA.

1. The courts below enforced a rule of preclusion, not of "exhaustion of remedies."

Directly contrary to *Alexander*, the courts below held that the district court "lacked *jurisdiction*, Pet.App. 6a, and that the failure to grieve the statutory claim "precludes a court from exercising *jurisdiction*" (emphasis supplied). Pet.App. 4a. The courts below relied on *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 881 (4th Cir.), *cert. denied*, ___ U.S. ___, 117 S. Ct. 432 (1996), which held that for claims under employment discrimination statutes, resort to "final and binding arbitration . . . . is obligatory" for workers covered by a collective bargaining agreement.[6] The district court in this case found the suit barred because the petitioner could not show that the union responded to his grievance "perfunctorily or in bad faith." Pet. App. 18a n.2. When the petitioner and the local union sought to submit the matter to arbitration, the courts below refused to retain jurisdiction to assure that the policies of the statute were respected. Pet. App. 5a. As a result, the courts below held, the local union's decision that a private suit was a better solution than a grievance had forfeited all of petitioner's statutory rights against respondents, including the right to present his claims in *any* forum.

2. Even if exhaustion were required, Petitioner did everything necessary to exhaust remedies through the union, and the respondents did not contend otherwise below.

The district court found that petitioner "initially followed the proper procedure under the collective bargaining agreement for filing a grievance against Defendants." Pet. App. 16a. The court also found that "[f]or whatever reason, his union chose not to pursue his claim." Pet. App. 18a. Only parties to the

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[6] *Austin* was based on the proposition that *Gilmer* had overruled *Alexander sub silentio*. *See* 78 F.3d at 880.

bargaining agreement could file and pursue a grievance, and the union, not petitioner, was a party to the agreement.[7] JA 55a ¶ 22; 36a ¶ 1; 47a. In both courts below, respondents agreed that petitioner promptly took proper steps to grieve the matter in January, 1995, but the "union chose not to pursue his claim."[8]

In this Court, respondents suggest that petitioner's request that the union assist him in returning to work did not adequately exhaust his grievance remedies, under the rule of *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965). Petitioner denies that the *Maddox* rule applies here, but if it applies, he met the standard that "the employee must afford the union the opportunity to act on his behalf." 379 U.S. at 653. Petitioner's request for assistance acknowledged "the union's status as exclusive bargaining representative . . . to participate actively in the continuing administration of the contract." *Id.*[9] As far as that agreement was concerned, petitioner personally could only present the matter to the union, which is exactly what he did. To require more than this of petitioner "would be 'particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process.'" *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 397 (1982), quoting *Love v. Pullman Co.*, 404 U.S. 522, 527 (1972).

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[7] *As a contract matter*, petitioner could not compel arbitration. *See Black-Clawson Co., Inc. v. International Ass'n of Mach.*, 313 F.2d 179, 184-86 (2d Cir. 1962), cited with approval in *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50, 59 n.7 (1975).

[8] In the trial court, respondents filed an affidavit that "Local 1422 could have grieved the dispute concerning Ceasar Wright . . . ," 4th Cir. Jt. App. at 145 ¶ 9, and their counsel recognized that the union had chosen not to proceed, see JA 6a, Tr. of Hearing 11/19/96 at page 11. In the Court of Appeals, respondents acknowledged that "the union chose not to proceed with a formal grievance." See JA 9a, Brief of Appellees filed 4/22/97, at p.31.

[9] A verbal request to the union for assistance can be sufficient to exhaust contract remedies. *See, e.g., Cruz v. Local Union No. 3, IBEW*, 34 F.3d 1148, 1151-53 (2d Cir. 1994). In *Air Line Pilots Ass'n v. Miller*, ___ U.S. ___, 118 S. Ct. 1761, 1767 (1998), this Court recently noted that the policy grounds that require exhaustion of administrative remedies provided by statute do not apply to arbitral remedies provided by private parties. Here, the policy to be furthered was the worker's respect for the role of the union, and petitioner completely satisfied that policy.

Respondents argue, in support of their exhaustion claim, that "Wright could have pressed his own grievance" (Resp. Br. at 23), either directly, under the proviso to 29 U.S.C. § 159(a), or by bringing a claim against the union for an unfair labor practice or a breach of the duty of fair representation. The latter methods of redress by establishing union misconduct simply could not apply in this case, as explained in Pet. Br. at 29, 37. As to whether petitioner could have "pressed his own grievance," the present record does show that when petitioner notified respondents of his ADA complaint, none of them suggested that he discuss a grievance directly with the employers or their association. JA 55a ¶ 23.

3. *Alexander* also established that rights under Title VII and related employment discrimination statutes are not proper for "deferral" to arbitration.

In *Alexander*, 415 U.S. at 55-59, this Court considered and unanimously rejected the argument that the federal courts should defer to an arbitral award if the contract contained a "nondiscrimination" clause, as did the bargaining agreement in that case. Here, the agreement did not even contain a "nondiscrimination" clause.[10] Even as they acknowledge that

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[10] Since this agreement has no "nondiscrimination" clause, petitioner had no contract rights as an "individual with a disability" to be free from discrimination. The "savings clause" of the contract did not incorporate into the agreement any affirmative obligations, either under the ADA or under any other statute. The contract therefore provided no right to the "reasonable accommodation" required by the ADA, JA 16a ¶ 26, and an arbitrator would have had no basis in the contract for ordering an accommodation.

Alexander rejected deferral, Resp. Br. at 17, respondents urge this Court to impose on statutes that "provide minimum substantive guarantees to individual workers," *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728, 737 (1981), the deferral rules the National Labor Relations Board has adopted for administering unfair labor practice charges that assert violation of collectively based rights under the National Labor Relations Act. *Hammontree v. NLRB*, 925 F.2d 1486, 1490-91 (D.C. Cir. 1991).

Assuming *arguendo* that the Board has correctly construed the NLRA to authorize deferral, as the court of appeals held in *Hammontree*, such a rule has no application to claims under employment discrimination statutes, as the EEOC (the agency charged with construing and enforcing both Title VII and the ADA) has recognized.[11] The court of appeals noted in *Hammontree* that the rules of deferment were unique to the provisions of the NLRA, designed to protect employees in the exercise of their rights to collective action, and these rules did not apply to Title VII, the FLSA, and other statutes that protect workers without regard to collective activity. "In the NLRA, Congress clearly did not seek to segregate private dispute resolution as a remedy 'separate from and independent of' statutory remedies." 925 F.2d at 1497. Further, the key issue in *Hammontree* was whether pre-arbitral deferment -- ordering the parties to arbitrate before the Board would review the ULP charge -- was a permissible exercise of the Board's broad discretion in construing the NLRA. To apply the *Hammontree* rule to the Title VII enforcement mechanisms (also applicable to the ADA) would require this Court to overrule *Alexander*.

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[11] The only cases in which deferral has been approved where "statutory" claims are at issue are cases relating to workers' *collective* rights under the NLRA or LMRA. *See, e.g., Gateway Coal Co. v. United Mine Workers of America*, 414 U.S. 368, 385-87 (1974). (LMRA; work stoppage for safety reasons is not protected under § 502, 29 U.S.C. § 143, unless union presents "objective evidence supporting its conclusion that an abnormally dangerous condition for work exists.")

Even if there were any reason to consider applying the NLRB's deferment policy to Title VII/ADA claims, respondents have rejected such an application by their own actions in this case, in repeatedly refusing to arbitrate petitioner's grievance. The respondents' brief, at p.16, cites the Board's rule that deferment will only be considered where "the employer has asserted its willingness to utilize arbitration to resolve the dispute," quoting *United Technologies Corp.*, 268 N.L.R.B. 557, 558 (1984). See also *Hammontree*, 925 F.2d at 1490. In light of this rule, it is frivolous to suggest that the federal courts should "defer" to the respondents' *refusal* to arbitrate petitioner's claims.

C. *Stare decisis* also compels the conclusion that a "general arbitration clause" in a collective bargaining agreement does not cover employees' claims under statutes that protect employees as individuals.

Respondents concede that "'arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to so submit.'" *Air Line Pilots Ass'n v. Miller*, ___ U.S. ___, 118 S.Ct. 1761, 4767 (1998); see Resp.Br. at 48. The bargaining agreement in this case, negotiated in 1990, before the *Gilmer* decision, JA 36a, was never intended to apply to claims of individual workers under the ADA and other federal employment statutes prohibiting discrimination.

Respondents do not argue (nor do their *amici*) that petitioner ever bound himself individually to arbitration, nor does anyone argue that the union subjectively intended to submit statutory employment discrimination claims to the grievance mechanism. Petitioner is aware of no individual claims under

these statutes that have ever been grieved under this agreement.[12] *Cf.* Pet. Br. at 17.

Rather, respondents' position is that the same "presumption of arbitrability" that attaches to disputes between union and management over interpretation of contract terms (Resp. Br. at 12-13) should also apply to disputes between a worker and his employer arising under federal statutes that protect the worker as an individual. To enforce *collective* rights, Congress in the Labor Management Relations Act, 29 U.S.C. §§ 171 *et seq.*, enacted a "liberal federal policy favoring arbitration agreements." Respondents argue that this same policy should be extended to petitioner's claim to enforce an *individual* right (Resp. Br. at 12-13). But this fails to address the decisions of this Court ruling that the labor policy favoring arbitration has no application to the claims of individuals under statutes directed at all workers, whether organized or not.

First, even in cases where the language of the arbitration clause has been at least as broad as the language here, this Court has not applied the "presumption of arbitrability" to statutory claims. *Barrentine*, 450 U.S. at 736-37 (agreement required "that 'any controversy' between the parties to the agreement be resolved through the binding contractual grievance procedures").[13]

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[12] In its Brief *Amicus Curiae* at p. 3, the National Association of Waterfront Employers asserts that the longshore industry relies on arbitration to "resolve disputes that involve individual statutory employment claims." However, in its discussion, the Association provides no examples where such claims have ever been arbitrated.

[13] If, as respondents argue (Br. at 29), this Court reached this result because "[t]he contract in *Barrentine* was quite vague regarding what issues could be grieved and arbitrated . . . . ," then this contract is even more vague, and its arbitration clause likewise cannot be read to apply to individual statutory claims of discrimination. The Arbitration Clause in this contract (Clause 15.(B)) has *no definition* of the scope of "matters under dispute."

Further, a "grievance" subject to collective bargaining processes is by definition a dispute "between union and employer with respect to the interpretation and application of the agreement." *United Paperworkers Inter. Union v. Misco, Inc.*, 484 U.S. 29, 36 (1987) (LMRA). "When the parties include an arbitration clause in their collective-bargaining agreement, they choose to have disputes concerning constructions of the contract resolved by an arbitrator." *W.R. Grace & Co. v. Local 759*, 461 U.S. 757, 764 (1983). *See also Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 255 (1994) (Railway Labor Act). Even in the *Hammontree* decision, the court of appeals recognized that the issue in dispute could be the subject of a grievance only because the employee's "discrimination claim . . . is also actionable under the contract." 925 F.2d at 1493. Thus, contrary to respondents' assertion, Br. at 18-19, the court in *Hammontree* did not reject the petitioner's position that § 203(d) of the LMRA limits the definition of a "grievance" to disputes about interpretation of the contract. *See* Pet. Br. at 17-21.

Finally, this Court has held that public law claims under statutes protecting individual workers are not subject to the grievance-arbitration mechanism where the agreement itself includes no language expressing a "clear and unmistakable" intent to use the grievance mechanism for claims under such statutes. *See Livadas v. Bradshaw*, 512 U.S. 107, 125 (1994).[14]

Petitioner has found no cases that ever found a "clear and unmistakable" waiver of a judicial forum for public law rights protecting individual workers (see Pet. Br. at 46), and respondents cite none.

As with *Alexander*, these decisions are entitled to respect under the doctrine of *stare decisis*. These decisions teach that statutory claims of individual workers under antidiscrimination statutes are not within the scope of a general arbitration clause that does not define "grievances" but refers generally to "Matters under dispute which cannot be promptly settled between the Local and an individual Employer." Clause 15.(B). JA 43a. Since respondents (and their *amici*) completely ignore these cases, no one has offered this Court any rationale for departing from these settled rules for determining the application of grievance mechanisms to claims under statutes that protect employees as individuals. Thus respondents offer no basis to justify the extensive revision of long-settled labor law precedents of this Court that would be required in order to apply decisions about commercial arbitration, such as *Gilmer*, to the labor grievance-arbitration process.

II. Overruling *Alexander* would undermine the ADA's deterrent purpose of avoiding harm by making it more difficult for individual victims of discrimination to obtain remedies against employers that discriminate.

In *Ellerth*, 118 S. Ct. at 2270, this Court noted the deterrent purpose of Title VII, a purpose which applies equally to the ADA. In order to realize that deterrent purpose, those who would practice discrimination must have a realistic expectation that the victims of their unlawful conduct have available to them effective processes for obtaining remedies. Thus, for example, in the Civil Rights Act of 1991 Congress made a "considered decision on the subject" of "the proper allocation of the costs of" unlawful conduct, *Faragher*, 118 S.

While respondents assume that all topics mentioned in the "zipper clause" (Clause 15.(F)) are intended to be within the scope of the Arbitration Clause, that is never explicitly stated in the contract. Indeed, the "zipper clause" provides that "anything not contained in this Agreement shall not be construed as being part of this Agreement," JA 46a. If that clause defines the scope of an arbitrator's authority, that authority is limited to the explicit contract terms.

[14] As we argued in Pet. Br. at 47-48, considerations of public policy requiring the knowing and voluntary waiver of individual rights would prevent this result in any case. But the question is not presented here.

Ct. at 2291 n.4. Specifically, in endorsing *Alexander*, Congress approved the allocation this Court made of the costs of discrimination by guaranteeing access to a judicial forum for the victims of discrimination in which to seek compensation from the primary wrongdoer.

The ruling below, that respondents support, drastically changes this balance and weakens the deterrent potential of the statute. It creates an incentive for employers, even when they are directly or vicariously liable for the discrimination, *see Ellerth* and *Faragher*, to minimize their potential remedial exposure by interpreting general grievance procedures in collective bargaining agreements to cover individual statutory claims, particularly when the union has not pursued a grievance, as in this case.[15] And it erects as a barrier to the victim's access to *any* forum the requirement of securing assistance from a collective bargaining representative that may have serious conflicting interests.

Here, as in *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 361 (7th Cir.), *cert. denied*, ___ U.S. ___, 118 S. Ct. 294 (1997), the Court has received "honey-tongued assurances of the employers' able counsel and their *amici* . . . . that there is no genuine conflict between employer and employee interests" in allowing employees to "be required by agreement to arbitrate statutory claims" (Resp. Br. at 2).[16] But respondents have not

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[15] If a union refuses or is unable to pursue an individual's claim of discrimination in the grievance process, or so incompetently handles the matter as to breach its "duty of fair representation," the employer's liability is limited to the pre-grievance period. *See Bowen v. United States Postal Serv.*, 459 U.S. 212 (1983).

[16] Respondents appear to approve "compulsory arbitration," which they agree to define as follows: "the system under which employers compel their prospective employees as a condition of employment to waive their rights to litigate future employment-related claims in a judicial forum" (Br. at 42, quoting *Duffield v. Robertson Stephens & Co.*, ___ F.3d ___, 76 FEP Cas.

denied that unions face many conflicting demands for use of their resources (see Pet. Br. at 26-28),[17] nor have they denied the obvious fact that a union would have a conflict of interest when the union itself or a co-worker represented by the union is accused of discrimination.[18] Respondents also do not deny that a worker must meet a very rigorous burden to show a breach of the "duty of fair representation." See Pet. Br. at 28, 37. In this case, for example, although the district court found that the union's view of available remedies was mistaken, the court also found that the union did not decline to press petitioner's grievance "perfunctorily or in bad faith" and therefore petitioner's lawsuit was barred. Pet. App. 18a n.2.

Nor have respondents pointed to any inaccuracies in petitioner's discussion of the deficiencies of the grievance

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1450, 1453 (9th Cir. May 8, 1998)). A stark example of such an arrangement was recently endorsed by the Fourth Circuit in *Johnson v. Circuit City Stores, Inc.*, ___ F.3d ___, 77 FEP Cas. 139 (4th Cir. July 1, 1998), where the application for employment absolutely conditioned hiring on an agreement to arbitrate disputes, and an agreement that "I may not file a lawsuit in court." The application further stated: "If you have decided **not** to agree to the terms of the preceding DISPUTE RESOLUTION AGREEMENT then you do not need to complete the balance of this application. We appreciate your interest in the company." *See also Hooters of America, Inc. v. Phillips*, 76 FEP Cas. 1757 (D.S.C. March 12, 1998).

[17] In the district court, respondents argued that petitioner's "interest in having his grievance arbitrated cannot override the interest of his fellow Longshoremen to expend their dues money in other ways." Dk. Entry #39 at p.7.

[18] While progress has been made in the extent to which labor organizations oppose discrimination, unions continue to appear as defendants in employment discrimination suits, including in cases that allege harassment by co-workers who are also represented by the union. *See, e.g., Krahel v. Owens-Brockway Glass Container, Inc.*, 971 F. Supp. 440 (D. Ore. 1997), and *Wright v. Over-the-Road & City Transfer Drivers, etc.*, 945 S.W.2d 48 (Mo. App. 1997). See also Pet. Br. at 26.

mechanism as an exclusive forum for resolving statutory disputes: its short time limits, lack of counsel, limited remedies, and procedures that provide much less protection than the procedures approved in *Gilmer* (procedures that are overseen by the Securities and Exchange Commission). Under the subject agreement, respondents do not deny that the employee may be barred from a hearing, even if his local union presses for arbitration. See Pet. Br. at 31-36.[19]

Decisions in the trial courts applying *Austin* demonstrate that all of these policy concerns are valid and compelling. *See, e.g., Moore v. Duke Power Co.*, 971 F. Supp. 978, 980, 983, 985 (W.D.N.C. 1997), in which "[t]he Union representative allegedly told Plaintiff he would address Plaintiff's disability claims in the arbitration, but then declined to do so and also prevented Plaintiff's attorney from participating in the arbitration." Notwithstanding these facts, in *Moore* the district court enforced the arbitrator's denial of the grievance and held that, even though the disability claim had been omitted by the union from the arbitration, the union had not handled the

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[19] If an employer wishes to resolve a dispute through the contractual grievance-arbitration mechanism, or through an agreement with the unionized worker for some other alternative means of dispute resolution, that may always be done by post-dispute agreement, as this Court endorsed in *Alexander*, 415 U.S. at 55. An employer and a union may also, under the NLRA and RLA, negotiate a pre-dispute collective agreement providing for a system of arbitration in which each employee may bring and present his individual statutory claims on a voluntary basis, and into which employees may opt on an individual basis. This Court recently reiterated the potential usefulness of voluntary non-judicial remedies in *Air Line Pilots Ass'n v. Miller*, ___ U.S. ___, 118 S. Ct. at 1769, citing *Patsy v. Board of Regents of Fla.*, 457 U.S. 496, 513 n.15 (1982): "under a '"free market" system' of no required exhaustion, 'litigants are free to pursue administrative remedies if they truly appear to be cheaper, more efficient, and more effective.'" Such use would frequently be appropriate when the claimed injury had small value. When these circumstances occur, both employees and employers have great economic incentive to utilize contract remedies rather than the courts.

grievance "perfunctorily or in bad faith" or in a "grossly deficient manner" so that plaintiff had no claim for breach of the duty of fair representation. Therefore, he could not bring his ADA claim before the court.

In the present case, in *Moore*, and in many other cases in federal district courts controlled by *Austin*, the result of imposing the grievance mechanism on statutory claims has been a complete forfeiture of those claims.[20] Such a result is the antithesis of the practice in commercial arbitration of the sort involved in *Gilmer*: there, a complaining party is simply required to proceed before the arbitrator rather than forfeiting the right to present his claim in *any* forum. In spite of the paramount national purposes of statutes prohibiting employment discrimination, neither respondents nor their *amici* consider forfeiture of claims to be of even questionable validity.

Any rule that substantially reduces the likely cost of a violation for the wrongdoer will likewise substantially reduce the deterrent effect of the statutory remedy. Congress, in approving the rule of *Alexander*, rendered a "considered decision" on the "proper allocation of the costs" of discrimination. *Faragher*, 118 S.Ct. at 2291 n.4. In order to "avoid harm" by maximizing the influence of the ADA on the employers' "primary conduct," this Court should reaffirm *Alexander* and reject respondents' invitation to overrule it.

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[20] *See, e.g., Bright v. Norshipco.*, 951 F. Supp. 95 (E.D. Va. 1997), *aff'd*, 133 F.3d 913 (4th Cir. 1998) (table) (district court lacked jurisdiction over ADA claim even though CBA provided that "Nothing contained in this Article shall preclude any employee from exercising his/her rights under federal and state law"); *Turner v. Bell Atlantic-Virginia, Inc.*, 1997 WL 687707, 1997 U.S. Dist. LEXIS 11192 (W.D. Va. May 5, 1997) (union initially demanded arbitration of grievance but withdrew demand without plaintiff's consent; plaintiff held barred because she did not take an internal union appeal to challenge withdrawal of grievance); *Hampton v. Kroger Co.*, 1996 WL 560306, 1996 U.S. Dist. LEXIS 14407 (W.D. Va. Sept. 27, 1996).

CONCLUSION

In *Ellerth* and *Faragher*, this Court has recently held that rules for enforcing federal employment discrimination laws should fairly implement the deterrent purposes of the statutes, to avoid harm by influencing the primary conduct of employers. The "bright-line" rule of *Alexander v. Gardner-Denver Co.*, *Barrentine v. Arkansas-Best Freight Systems, Inc.*, and *McDonald v. City of West Branch* have served this deterrent purpose well, by preserving the right of employees to proceed to court to enforce the statutes, if non-judicial remedies do not prove satisfactory.

Congress has considered the rule of *Alexander* several times and endorsed it every time. The rule includes the observation, 415 U.S. at 55, that, since "the grievance-arbitration machinery of the collective-bargaining agreement remains a relatively inexpensive and expeditious means for resolving a wide range of disputes, including claims of discriminatory employment practice," employees may satisfactorily resolve complaints of discrimination with the union's assistance, as petitioner initially sought to do. Petitioner would have been happy to utilize alternative dispute resolution to end this matter; it is respondents who still seek to enforce a forfeiture of petitioner's rights.

The respondents' recalcitrance is a classic example of why the rule in *Alexander* was right when decided, and remains right today. *Alexander* should be reaffirmed. The judgment below should be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1997

CEASAR WRIGHT, PETITIONER,

v.

UNIVERSAL MARITIME SERVICE CORP., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE SUPPORTING PETITIONER

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36 pp

QUESTION PRESENTED

Whether a general arbitration clause in a collective bargaining agreement bars an employee covered by the contract from filing his own lawsuit under a federal antidiscrimination statute.

TABLE OF CONTENTS

Page

Interest of the United States and the Equal Employment Opportunity Commission 1

Statement 2

Summary of argument 5

Argument: 7

An arbitration clause in a collective bargaining agreement does not bar an employee covered by the agreement from filing his own lawsuit under a federal antidiscrimination statute 7

A. This case is controlled by this Court's decision in *Alexander* v. *Gardner-Denver*, which holds that an arbitration provision in a collective bargaining agreement does not preclude an individual employee from pursuing a judicial remedy under an antidiscrimination statute 7

B. This Court's decision in *Gilmer* reaffirms that an individual's federal statutory antidiscrimination claim cannot be waived in a collective bargaining agreement 11

1. A union may not waive an individual's substantive or procedural rights under federal antidiscrimination statutes 13

a. Contract negotiations 13

b. Grievance procedures 17

2. Other distinctions between *Gilmer* and *Alexander* also suggest that this case is controlled by *Alexander* 20

Table of Contents—Continued: .... Page

C. Provisions in federal antidiscrimination statutes encouraging knowing and voluntary use of alternative means of dispute resolution do not authorize use of such means where a union—but not the claimant—has purportedly agreed to waive statutory judicial remedies 24

Conclusion 29

TABLE OF AUTHORITIES

Cases:

Agostini v. *Felton*, 117 S. Ct. 1997 (1997) 9

Air Line Pilots Ass'n v. *O'Neill*, 499 U.S. 65 (1991) 15

Alexander v. *Gardner-Denver Co.*, 415 U.S. 36 (1974) 5, 6, 7, 8, 9, 16, 21, 22, 23

Allis-Chalmers Corp. v. *Lueck*, 471 U.S. 202 (1985) 10

Atchison, Topeka, & Santa Fe Ry. v. *Buell*, 480 U.S. 557 (1987) 10

Austin v. *Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir.), cert. denied, 117 S. Ct. 432 (1996) 4, 23

Barrentine v. *Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728 (1981) 10, 18, 20

Brisentine v. *Stone & Webster Eng'g Corp.*, 117 F.3d 519 (11th Cir. 1997) 11, 13

Brown v. *TWA*, 127 F.3d 337 (4th Cir. 1997) 11

City of Los Angeles Dep't of Water & Power v. *Manhart*, 435 U.S. 702 (1978) 17

Connecticut v. *Teal*, 457 U.S. 440 (1982) 16, 17

Domino Sugar Corp. v. *Sugar Workers Local Union 392*, 10 F.3d 1064 (4th Cir. 1993) 22

Cases—Continued Page

Electrical Workers v. *Robbins & Myers, Inc.*, 429 U.S. 229 (1976) 9

Ford Motor Co. v. *Huffman*, 345 U.S. 330 (1953) 15

Gatliff Coal Co. v. *Cox*, 142 F.2d 876 (6th Cir. 1944) 22

Gilmer v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) .... *passim*

Great Western Mortgage Corp. v. *Peacock*, 110 F.3d 222 (3d Cir.), cert. denied, 118 S. Ct. 299 (1997) 23

Harrison v. *Eddy Potash, Inc.*, 112 F.3d 1437 (10th Cir. 1997) 11

Herring v. *Delta Airlines, Inc.*, 894 F.2d 1020 (9th Cir.), cert. denied, 494 U.S. 1016 (1990) 22

LaChance v. *Northeast Pub., Inc.*, 965 F. Supp. 177 (D. Mass. 1997) 26

Lincoln Mills v. *Textile Workers Union of America*, 230 F.2d 81 (5th Cir. 1956), rev'd on other grounds, 353 U.S. 448 (1957) 22

Lingle v. *Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988) 22

Livadas v. *Bradshaw*, 512 U.S. 107 (1994) 21-22

Mastro Plastics Corp. v. *NLRB*, 350 U.S. 270 (1956) 14

McDonald v. *City of West Branch*, 466 U.S. 284 (1984) 10

Metropolitan Edison Co. v. *NLRB*, 460 U.S. 693 (1983) 14, 22

NLRB v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967) 14

NLRB v. *Erie Resistor Corp.*, 373 U.S. 221 (1963) 14

NLRB v. *Magnavox Co.*, 415 U.S. 322 (1974) 14, 15

Penny v. *United Parcel Serv.*, 128 F.3d 408 (6th Cir. 1997) 11

Cases—Continued Page

Pryner v. *Tractor Supply Co.*, 109 F.3d 354 (7th Cir.), cert. denied, 118 S. Ct. 294 (1997) 11, 19
Rodriguez v. *Shearson/American Express, Inc.*, 490 U.S. 477 (1989) 9
Rojas v. *TK Communications, Inc.*, 87 F.3d 745 (5th Cir. 1996) 23
Thurston Motor Lines, Inc. v. *Jordan K. Rand, Ltd.*, 460 U.S. 533 (1983) 9
Tran v. *Tran*, 54 F.3d 115 (2d Cir. 1995), cert. denied, 517 U.S. 1134 (1996) 11
United Food & Commercial Workers v. *Safeway Stores, Inc.*, 889 F.2d 940 (10th Cir. 1989) 22
United Paperworkers Int'l Union, v. *Misco*, 484 U.S. 29 (1987) 22
Vaca v. *Sipes*, 386 U.S. 171 (1967) 18
Varner v. *National Super Markets, Inc.*, 94 F.3d 1209 (8th Cir. 1996), cert. denied, 117 S. Ct. 946 (1997) 11

Statutes:

Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.* 1, 12
  29 U.S.C. 626 2
  29 U.S.C. 626(c) 28
  29 U.S.C. 626(f)(1) 28
  29 U.S.C. 626(f)(1)(C) 28
  29 U.S.C. 633a 2
Americans with Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.* 1
  42 U.S.C. 12117 16
  42 U.S.C. 12117(a) 2, 8
  42 U.S.C. 12188(b) 2
  42 U.S.C. 12212 .... 6, 24

Statutes—Continued: Page

Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e *et seq.* 1, 2, 7, 8, 9, 10, 16, 17, 24
  42 U.S.C. 2000e-5(a) 2
  42 U.S.C. 2000e-5(f)(1) 2
Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071:
  § 118, 105 Stat. 1081 .... 24, 27
  § 118, 105 Stat. 1081 (42 U.S.C. 1981 note) 27
Federal Arbitration Act, § 1, 9 U.S.C. 1 22
Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.* 2
National Labor Relations Act, 29 U.S.C. 151 *et seq.* 13
  29 U.S.C. 163 14
Older Workers Benefit Protection Act, Pub. L. No. 101-433, § 202, 104 Stat. 984 28
42 U.S.C. 1983 10

Miscellaneous:

137 Cong. Rec.:
  p. S15478 (daily ed. Oct. 30, 1991) 27
  p. H9530 (daily ed. Nov. 7, 1991) 27
Mathew W. Finkin, *"Workers' Contracts" Under The United States Arbitration Act: An Essay In Historical Clarification*, 17 Berkeley J. Empl. & Lab. L. 282 (1996) 23
H.R. Conf. Rep. No. 596, 101st Cong., 2d Sess. (1990) 25
H.R. Rep. No. 485, 101st Cong., 2d Sess., Pt. III (1990) 26
H.R. Rep. No. 664, 101st Cong., 2d Sess. (1990) 28
H.R. Rep. No. 40, 102d Cong., 1st Sess., Pt. I (1991) 28
S. Rep. No 79, 101st Cong., 1st Sess. (1989) 28
S. Rep. No. 263, 101st Cong., 2d Sess. (1990) 28

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INTEREST OF THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

This case presents the question whether an individual can be compelled to arbitrate a statutory claim of discrimination under the Americans with Disabilities Act, 42 U.S.C. 12101 *et seq.* (ADA), pursuant to an arbitration clause in a collective bargaining agreement. Although this case involves a claim under the ADA, the decision of this Court is likely to affect similar cases arising under other federal statutes, such as Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* (Title VII), and the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.* (ADEA). The Attorney General is responsible for enforcing Title VII and the ADA with respect to public employers. See 42 U.S.C. 2000e-5(f)(1) (Title VII); 42 U.S.C. 12117(a), 12188(b) (ADA). The Equal Employment Opportunity Commission (EEOC) has authority to enforce Title VII and the ADA with respect to private employers and the ADEA with respect to both public and private employers. See 42 U.S.C. 2000e-5(a) (Title VII); 42 U.S.C. 12117(a) (ADA); 29 U.S.C. 626, 633a (ADEA).

STATEMENT

1. Petitioner Ceasar Wright was employed as a longshoreman in Charleston, South Carolina, from 1970 to 1992. On February 18, 1992, petitioner was injured at work. Petitioner filed a claim for disability benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq*. Petitioner eventually settled the claim with his employer, Stevens Shipping Company. Pet. App. 3a.

On January 2, 1995, petitioner appeared at the hiring hall of Local 1422 of the International Longshoreman's Association (ILA), seeking work. At the time, petitioner's physician stated that petitioner's condition had improved to the point that he could return to full duty. From January 2 through January 11, 1995, the union referred petitioner to four different stevedoring contractors. Initially, none of the companies objected to petitioner's work. Once the companies learned, however, that petitioner had settled a claim for disability, they mutually agreed not to employ petitioner and informed the union that petitioner would no longer be accepted for job referral. Pet. App. 3a.

Petitioner's employment as a longshoreman was subject to a collective bargaining agreement (CBA) between the ILA and a number of individual employers represented by the South Carolina Stevedores Association. Pet. App. 2a.

Under the CBA, the union is permitted to pursue a grievance on behalf of a union member. The CBA's grievance and arbitration procedures apply to "all matters affecting wages, hours, and other terms and conditions of employment." *Id.* at 4a . The CBA also states that "[i]t is the intention and purpose of all the parties hereto that no provision or part of this Agreement shall be violative of any Federal or State law." *Id.* at 17a.

Under the CBA, the union, as a precondition to pursuing a grievance, must initially attempt to resolve the dispute through informal discussions with the employer. Pet. App. 15a There are three stages that follow. If the informal discussions fail, the claim must be submitted within 48 hours to the grievance committee. *Id.* at 15a-16a. If that committee cannot resolve the matter, the grievance may be referred to a second grievance committee. *Id.* at 16a n.1. If the dispute cannot be resolved by the second grievance committee, the grievance may be referred to third-party arbitration. *Ibid.*

When petitioner learned of the companies' refusal to accept him for employment, he promptly contacted his union representative. Pet. App. 21a-22a. The union sought to resolve the matter informally, but it was unable to do so. *Id.* at 16a. The union did not initiate a formal grievance under the CBA and did not invoke the arbitration procedure specified by the CBA. *Ibid.* Instead, the union representative informed petitioner that he should pursue a statutory claim under the ADA. *Id.* at 3a.

2. In January 1996, petitioner filed suit under the ADA, alleging disability discrimination. Pet. App. 20a. Petitioner named respondents—the South Carolina Stevedores Association and the individual companies that had mutually decided not to employ petitioner—as defendants. *Ibid.* Respondents moved for summary judgment, arguing that petitioner's suit should be dismissed because he was re-

quired to pursue his statutory claim of discrimination under the grievance and arbitration procedures of the CBA.

Based on a magistrate's report recommending dismissal, Pet. App. 19a-26a, the district court granted respondents' motion. *Id.* at 6a-13a. The court agreed with respondents that the case was controlled by the Fourth Circuit's decision in *Austin* v. *Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir.), cert. denied, 117 S. Ct. 432 (1996). In that case, the Fourth Circuit, relying on *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), ruled that an individual is precluded from pursuing his or her statutory claim of discrimination in federal court, as an original matter, if that individual is subject to a CBA that contains an arbitration provision purporting to cover such employment disputes. Citing the "overriding federal policy favoring arbitration," the district court in this case concluded that petitioner's complaint "was subject to mandatory arbitration under the terms of the bargaining agreement and, thus, that [the district] court lacks jurisdiction to hear the case." Pet. App. 8a-9a.

3. On appeal, the Fourth Circuit affirmed in an unpublished opinion that relied heavily on *Austin*. Pet. App. 2a-5a. The court of appeals observed that, "[i]n *Austin*, this court established that collective bargaining agreements to arbitrate employment disputes are binding upon individual employees even when the dispute involves a federal cause of action." *Id.* at 4a. The court stated that, "under *Austin*, the only issue in this case is whether there was an agreement to arbitrate ADA claims in the CBA." *Ibid.* The court determined that the language of the CBA referring to "all matters affecting wages, hours, and other terms and conditions of employment * * * easily encompasses [petitioner's] ADA claim," thus mandating arbitration of the claim under the provisions of the CBA. *Id.* at 4a-5a.

SUMMARY OF ARGUMENT

This case is squarely controlled by *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974). This Court in *Alexander* held that an arbitration provision in a collective bargaining agreement does not preclude an aggrieved individual from pursuing his or her statutory antidiscrimination claim in federal court. The holding in *Alexander* applies directly to this case and permits petitioner to pursue his statutory remedy.

The Fourth Circuit declined to follow *Alexander* and its progeny on the basis of its own prior ruling that *Alexander* had been rendered inapplicable by this Court's decision in *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). In *Gilmer*, however, the Court held that an employee who entered into a valid *individual* agreement to arbitrate disputes could be barred by that agreement from bringing a claim under a federal anti-discrimination statute in federal court. *Gilmer* did not involve union representation, a collective bargaining agreement or, indeed, a contract of employment at all. See *id.* at 25 n.2. Far from overruling *Alexander*, the Court in *Gilmer* explained that the *Alexander* holding was inapplicable to the facts before it for several reasons, none of which is applicable here.

Gilmer drew a critical distinction between commitments to arbitrate that are embodied in collective bargaining agreements, as in *Alexander*, which create a "tension between collective representation and individual statutory rights," 500 U.S. at 35, and commitments to arbitrate that are embodied in individual contracts, as in *Gilmer*. Because the federal antidiscrimination statutes protect "not majoritarian processes, but an individual's right to equal employment opportunities," *Alexander*, 415 U.S. at 51, the vindication of that right can be committed to arbitration only by an individual contract, as in *Gilmer*, and not by a collective bargaining agreement. The individual employee's ability to vindicate a federal antidiscrimination claim cannot be made to depend on a union's judgment about the collective best interests of its employees, either at the time of negotiating an arbitration clause in the CBA, or at the time of presenting or compromising a particular claim. In short, as *Alexander* and subsequent cases recognized, and *Gilmer* reaffirmed, it would be inconsistent with the purposes of the federal antidiscrimination statutes to permit a union to control the means of vindicating an individual's rights under those statutes.

Provisions in federal antidiscrimination statutes encouraging the use of methods of alternative dispute resolution, including arbitration "[w]here appropriate and to the extent authorized by law," 42 U.S.C. 12212, do not require a different conclusion. When Congress enacted those provisions, Congress was aware of this Court's unbroken line of decisions making clear that arbitration of a claim of discrimination is not "appropriate" or "authorized by law" if the individual making the claim has never agreed to waive the federal judicial remedies created by the statute under which the individual's claim is brought. The legislative history of these provisions makes clear that Congress intended to apply and not repudiate the holding of *Alexander*. Accordingly, although these provisions favor arbitration agreements entered into knowingly and voluntarily by an individual employee, they have no bearing on the question whether a collective bargaining agreement may waive an employee's substantive or procedural rights under a federal antidiscrimination statutes.

ARGUMENT

AN ARBITRATION CLAUSE IN A COLLECTIVE BARGAINING AGREEMENT DOES NOT BAR AN EMPLOYEE COVERED BY THE AGREEMENT FROM FILING HIS OWN LAWSUIT UNDER A FEDERAL ANTIDISCRIMINATION STATUTE

A. This Case Is Controlled By This Court's Decision In *Alexander* v. *Gardner-Denver*, Which Holds That An Arbitration Provision In A Collective Bargaining Agreement Does Not Preclude An Individual Employee From Pursuing A Judicial Remedy Under An Antidiscrimination Statute

1. This case is directly controlled by this Court's decision nearly 25 years ago in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974). In *Alexander*, an employee subject to a collective bargaining agreement was discharged from his job and alleged that the discharge was the result of race discrimination by the employer. *Id.* at 38, 42. The collective bargaining agreement established a grievance and arbitration procedure and expressly prohibited "discrimination against any employee on account of race, color, religion, sex, national origin, or ancestry." *Id.* at 39. The plaintiff's union invoked the grievance and arbitration procedure, but the arbitrator ruled that the employee had been discharged for "just cause." *Id.* at 42-43. The employee then brought suit against the employer under Title VII. *Id.* at 43. The employer argued that the employee was bound by the arbitration procedure established under the CBA and thus precluded from seeking a judicial remedy under Title VII.

This Court held that the employee was entitled to pursue his statutory claim in court, notwithstanding the arbitration procedure established under the CBA. The Court rejected the argument that the employee had forfeited his cause of action in federal court under Title VII by electing the remedy of arbitration instead. 415 U.S. at 49-50. The Court also rejected the suggestion "that [the employee] waived his cause of action under Title VII" by pursuing arbitration. *Id.* at 51. The Court acknowledged "that a union may waive certain statutory rights related to collective activity, such as the right to strike," because those "rights are conferred on employees collectively to foster the processes of bargaining and properly may be exercised or relinquished by the union as collective-bargaining agent to obtain economic benefits for union members." *Id.* at 51. The Court explained, however, that "Title VII * * * stands on plainly different ground," because "it concerns not majoritarian processes, but an individual's right to equal opportunities." *Ibid.* Therefore "the rights conferred can form no part of the collective-bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII." *Ibid.*

2. The Court's holding in *Alexander* is sufficient to dispose of this case. As in *Alexander*, petitioner suffered an adverse employment decision that he believed was discriminatory in violation of a federal antidiscrimination statute. Although the employee's claim in *Alexander* arose under Title VII and petitioner's claim arose under the ADA, there is no difference between the statutes relevant to the *Alexander* analysis. See, *e.g.*, 42 U.S.C. 12117(a) (Title VII enforcement "powers, remedies, and procedures" apply to ADA). As in *Alexander*, petitioner was subject to a collective bargaining agreement that established a grievance procedure that would lead ultimately to binding arbitration for employment-related disputes. See 415 U.S. at 40. Therefore, this Court's conclusion in *Alexander* that the collective bargaining agreement could not and did not waive the employee's right to a federal

court remedy under Title VII is equally applicable to this case. The Fourth Circuit erred in refusing to follow *Alexander*.[1]

Alexander cannot be distinguished on the ground that the employee in *Alexander* first proceeded through arbitration, while petitioner did not. To the contrary, like the employee in *Alexander*, petitioner here invoked his contractual remedies and took them as far as he could, *i.e.*, until the union informed him that it would not pursue them further. Moreover, *Alexander* does not in any way rest on a determination that the employee had exhausted his contractual remedies. Instead, the holding in *Alexander* is squarely based on the conclusion that the employee's rights to proceed in federal court had not been—and could not be—waived by a collective bargaining agreement. Only after holding that such a waiver would be ineffective, see 415 U.S. at 51, did the Court go on to consider whether "[t]he actual submission of [the employee's] grievance to arbitration * * * alter[s] the situation," see 415 U.S. 52, and to decide that it does not. This Court's later holding in *Electrical Workers* v. *Robbins & Myers, Inc.*, 429 U.S. 229 (1976), makes the point clear. Relying on *Alexander*, see 429 U.S. at 236, 238, the Court held in that case that pursuit of a contractual arbitration remedy does not toll Title VII's time limits. That holding would be inconsistent with a ruling that the employee must nonetheless pursue a contractual grievance and arbitration process and thereby risk losing the right to a judicial remedy under Title VII.

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[1] See *Agostini* v. *Felton*, 117 S. Ct. 1997, 2017 (1997) ("[I]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."); *Rodriguez* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989); *Thurston Motor Lines, Inc.* v. *Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983) (per curiam).

3. This Court has applied the principle of *Alexander* not only in *Electrical Workers*, but also in two other succeeding cases. In each case, the Court held that the creation of a grievance and arbitration procedure under a collective bargaining agreement, or even the invocation of such a procedure by the employee, does not alter an employee's ability to pursue a private right of action created under a federal statutory scheme. See, *e.g.*, *Barrentine* v. *Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728 (1981) (claim brought under Fair Labor Standards Act); *McDonald* v. *City of West Branch*, 466 U.S. 284, 292 (1984) (claim brought under 42 U.S.C. 1983).[2] Those decisions reaffirm the *Alexander* principle in other contexts. The court of appeals' decision in this case and its prior decision in *Austin* therefore conflict with the reasoning of these other cases as well.

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[2] While these cases involve suits under statutes other than the antidiscrimination statutes at issue in *Alexander* and in this case, the same principles apply. In each case, this Court concluded that Congress designed the federal statutory scheme "to provide minimum substantive guarantees to individual workers," *Atchison, Topeka, & Santa Fe Ry.* v. *Buell*, 480 U.S. 557, 565 (1987), which "could not be avoided by a contractual agreement," *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202, 213 n.8 (1985). For that reason, the purported waiver of an individual's statutory rights or of the means to enforce those rights in a collective bargaining agreement was held ineffective in these cases as in *Alexander*. The same analysis applies here.

B. This Court's Decision In *Gilmer* Reaffirms That An Individual's Federal Statutory Antidiscrimination Claim Cannot Be Waived In A Collective Bargaining Agreement

The court of appeals in this case declined to follow *Alexander* in reliance on its own previous holding in *Austin* that an arbitration procedure in a collective bargaining agreement precluded a statutory antidiscrimination claim in federal court. In *Austin*, the Fourth Circuit appears to have concluded that this Court's decision in *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), had undercut the authority of *Alexander* in cases like this, where a collective bargaining agreement provides for an exclusive grievance and arbitration procedure for resolving workplace disputes.[3] That conclusion was mistaken.[4]

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[3] The Fourth Circuit has continued to recognize the authority of *Alexander* in cases in which the collective bargaining agreement expressly limits arbitration to disputes "growing out of the interpretation or application of any of the terms of [the CBA]" and thereby deprives the arbitrator of authority to decide a purely statutory claim. *Brown* v. *TWA*, 127 F.3d 337, 341 (4th Cir. 1997).

[4] Every other court of appeals to have addressed the issue since *Gilmer* has concluded that *Alexander* continues to preclude waiver in a collective bargaining agreement of an individual's substantive or procedural rights under federal antidiscrimination statutes. See, *e.g.*, *Penny* v. *United Parcel Serv.*, 128 F.3d 408, 411-14 (6th Cir. 1997); *Brisentine* v. *Stone & Webster Eng'g Corp.*, 117 F.3d 519, 525-27 (11th Cir. 1997); *Harrison* v. *Eddy Potash, Inc.*, 112 F.3d 1437, 1452-54 (10th Cir. 1997); *Pryner* v. *Tractor Supply Co.*, 109 F.3d 354, 365 (7th Cir.), cert. denied, 118 S. Ct. 294 (1997); *Varner* v. *National Super Markets, Inc.*, 94 F.3d 1209, 1213 (8th Cir. 1996), cert. denied, 117 S. Ct. 946 (1997); see also *Tran* v. *Tran*, 54 F.3d 115 (2d Cir. 1995) (reaching the same conclusion with respect to claims under the Fair Labor Standards Act), cert. denied, 517 U.S. 1134 (1996).

In *Gilmer*, this Court held that a claim of discrimination under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq*., can be subjected to compulsory arbitration pursuant to an arbitration agreement in a securities registration application. The plaintiff in *Gilmer* was an account representative at a securities firm; he was not represented by a union and he was not covered under a collective bargaining agreement. In an application to register with the New York Stock Exchange, he agreed to arbitration of "[a]ny controversy between a registered representative and any [Stock Exchange] * * * member organization arising out of the employment or termination of employment of such registered representative." 500 U.S. at 23. This Court held that the agreement to arbitrate was enforceable.

Like the plaintiff in the present case, the plaintiff in *Gilmer* argued, *inter alia*, that *Alexander*, *Barrentine*, and *McDonald* established that federal statutory antidiscrimination claims could not be effectively vindicated in an arbitral forum, and that therefore a judicial remedy for such claims would not be precluded by the arbitration agreement. See 500 U.S. at 33. This Court rejected that argument, but it did not do so by overruling *Alexander* or the succeeding cases. Instead, it explained that there were critical distinctions that rendered the holding of *Alexander* inapplicable to the facts of *Gilmer*. Because those distinctions are inapplicable here, the holding of *Alexander* controls this case.[5]

1. *A Union May Not Waive An Individual's Substantive Or Procedural Rights Under Federal Antidiscrimination Statutes.* The most significant distinction between *Alexander* and *Gilmer* is that in *Alexander* the arbitration clause was found in a collective bargaining agreement, while in *Gilmer* it was found in an individual contract. In distinguishing *Alexander*, the Court in *Gilmer* explained that "because the arbitration in [*Alexander* and its progeny] occurred in the context of a collective-bargaining agreement, the claimants there were represented by their unions in the arbitration proceedings." *Gilmer*, 500 U.S. at 35. The Court explained that "[a]n important concern therefore [in *Alexander*] was the tension between collective representation and individual statutory rights"—which was "a concern not applicable to [*Gilmer*]." *Ibid.* That tension affects both the initial agreement by the union to a particular arbitration procedure in the collective bargaining agreement, and the processing of grievances within that procedure when they arise.

a. *Contract Negotiations.* Under the National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq*., a union may be selected as the exclusive agent for its members in dealing with the employer. Acting in that role in contract negotiations with the employer, the union may waive a wide variety of rights, in order to obtain a better deal with the employer. For example, a union may waive a member's

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[5] The Court in *Gilmer* criticized the view expressed in *Alexander* "that arbitration was inferior to the judicial process for resolving statutory claims." 500 U.S. at 34 n.5, noting that such "mistrust of the arbitral process * * * has been undermined" by the Court's more recent decisions. *Ibid*. The Court did not, however, overrule *Alexander*. Instead, as we discuss in the succeeding portion of this brief, the Court explained that "[t]here are several important distinctions between the *Gardner-Denver* line of cases and the case before us," which established that "those cases provide no basis for refusing to enforce Gilmer's agreement to arbitrate his ADEA claim." *Id.* at 35. Had the Court believed that *Alexander* was no longer good law, this entire portion of the opinion would have been unnecessary. See *Brisentine* v. *Stone & Webster Engineering Corp.*, 117 F.3d 519, 523 (11th Cir. 1997) ("Distinguishing a prior precedent that is being overruled would make as much sense as pruning a plant that is being dug up and discarded.").

"right to strike during the contract term, and his right to refuse to cross a lawful picket line," *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967); see also *Mastro Plastics Corp.* v. *NLRB*, 350 U.S. 270, 280 (1956), even though the employee would retain those rights under the NLRA in the absence of a contractual waiver. See, *e.g.*, 29 U.S.C. 163; *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221, 233-234 (1963). Similarly, the union may "bind its officials to take affirmative steps to end an unlawful work stoppage," *Metropolitan Edison Co.* v. *NLRB*, 460 U.S. 693, 706 (1983), and subject them to distinctive employer-imposed discipline if they fail to do so, even though in the absence of such an agreement the employer could not impose unique disciplinary sanctions on union officials, see *id.* at 702-704. In short, permitting a union to waive many of the rights to engage in concerted activity protected by the NLRA is consistent with the purposes of that statute, and such waivers are honored by the courts and enforced.

There are some rights belonging to bargaining unit members, however, that may not be waived in a collective bargaining agreement. In particular, where permitting waiver of a right in a collective bargaining agreement would create an "inherent conflict" with the statute that created the right, such a waiver is not permitted. *Gilmer*, 500 U.S. at 26. Even under the NLRA, for example, although "a union may bargain away its members' economic rights, * * * it may not surrender rights that impair the employees' choice of their bargaining representative." *Metropolitan Edison*, 460 U.S. at 705-706; see *NLRB* v. *Magnavox Co.*, 415 U.S. 322, 325 (1974); *Mastro Plastics*, 350 U.S. at 281-282. That is because such waivers would be inconsistent with the basic premise underlying the NLRA's scheme for collective representation, which "presuppose[s] that the selection of the bargaining representative remains free." *Magnavox*, 415 U.S. at 325 (internal quotation marks omitted).

Similarly, a union may not waive its members' basic rights to a federal judicial forum under federal antidiscrimination statutes, because recognizing such a waiver would be inconsistent with the purposes underlying those statutes. When a union negotiates a collective bargaining agreement, the union's goal is to negotiate an arrangement that maximizes the well-being of the members of the bargaining unit as a group. To accomplish that goal, the union may face difficult choices among competing terms that would benefit different subgroups of its members. But in light of the "differences * * * in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees, * * * [a] wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion." *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 338 (1953). See also *Air Line Pilots Ass'n* v. *O'Neill*, 499 U.S. 65, 76 (1991) ("wide range of reasonableness" standard applies to contract negotiation).

In particular, when a union negotiates a procedure for resolving disputes through arbitration, the union may face critical choices regarding the shaping of the dispute resolution machinery. The union may, for example, seek to obtain procedures that will provide an exceptional opportunity for members of the bargaining unit to prevail on claims arising from the most common contract violations. For that reason, a union may decide, for example, that particularly short deadlines for filing and resolving claims are appropriate, because ordinary contractual disputes may be suitable for virtually immediate resolution.[6] The union may reasonably deem inconsequential the fact that those same procedures are not optimal for resolving claims under federal antidiscrimination statutes; even acting in complete good faith and satisfying its duty of fair representation, the union may decide that bargaining unit members are, collectively, likely to be better off with the procedures most suitable to the ordinary run of disputes.

Although that decision by the union may be unexceptionable, it provides no guarantee that each individual who has suffered discrimination under a federal statute will have had an adequate opportunity either to avail himself of the statutory remedial scheme or to decide instead that waiver of that scheme in favor of arbitration is acceptable. Subordinating the interest of each such individual to the collective interests of the bargaining unit members in this way would be inconsistent with the intense focus of federal antidiscrimination statutes on the right of each individual to be free of discrimination. See *Alexander*, 415 U.S. at 51 (Title VII "concerns not majoritarian processes, but an individual's right to equal employment opportunities"). That right does not depend on how other employees are treated or how classes of which the individual may be a member are affected.

For example, in *Connecticut* v. *Teal*, 457 U.S. 440, 453 (1982), this Court rejected the claim that a discriminatory employment practice could be defended on the ground that, at the "bottom line," members of the minority group were nonetheless fairly represented. As the Court explained, "[t]he principal focus of [Title VII] is the protection of the individual employee," 457 U.S. at 453, and "[e]very *individual* employee is protected" by the statute, *id.* at 455. In *City of Los Angeles Dep't of Water & Power* v. *Manhart*, 435 U.S. 702 (1978), the Court held that Title VII precludes an employer from requiring women to contribute more to its pension fund than men, on the ground that women on average live longer and are thus likely to benefit from the pension program more than men. The Court explained that it was "of critical importance" to its decision that "[t]he statute's focus on the individual is unambiguous," since the employer's policy would result in some individual women, who do not live as long as the average man, receiving smaller paychecks while working and receiving no compensating advantage when they retire. *Id.* at 708. "[T]he basic policy of the statute requires that we focus on fairness to individuals rather than fairness to classes." *Id.* at 709.

Subjecting the means of vindicating a discrimination claim to majoritarian decisionmaking by the union is thus inconsistent with that basic policy of Title VII and the other federal antidiscrimination statutes. Accordingly, the inclusion of an exclusive arbitration provision in a collective bargaining agreement cannot waive the rights of each bargaining unit member to take advantage of—or waive, on an individual basis—the full array of remedial mechanisms created by a federal antidiscrimination statute.

b. *Grievance Procedures.* Even if individual employees' judicial remedies under federal antidiscrimination laws could be waived in a collective bargaining agreement, it would be inconsistent with those laws to relegate the employee to an arbitration process that, like most collectively bargained grievance procedures, gives the union control over whether and how to present or compromise claims. In such a scheme, there is an inherent conflict between the union's collective responsibilities and the employee's highly individual federal statutory rights.

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[6] In this case, the contract provided that, if the union and employer cannot settle a dispute informally, the claim must be submitted in writing to a grievance committee within 48 hours. Pet. App. 15a-16a. Under the ADA, by contrast, the statute of limitations is 180 or 300 days. 42 U.S.C. 12117 (incorporating Title VII's enforcement procedures).

Under a typical collectively bargained grievance/arbitration procedure—like the one established by the collective bargaining agreement in this case—an individual may not unilaterally obtain binding arbitration of a claim. Instead, the union must decide whether and how the grievance should be pursued or compromised, either in an initial, informal attempt at resolution or in later stages of the process up to and including binding arbitration. See *Barrentine*, 450 U.S. at 742 ("Wage and hour disputes that are subject to arbitration under a collective-bargaining agreement are invariably processed by unions rather than by individual employees."); *Vaca* v. *Sipes*, 386 U.S. 171, 190-193 (1967). The union's control over whether and how a claim is presented to arbitration, however, creates "the tension between collective representation and individual statutory rights," *Gilmer*, 500 U.S. at 35, that was not present in *Gilmer* and that was an important basis for the Court's decision in *Alexander*.

The arbitration procedure in this case exemplifies the problem, because the union, rather than the individual employee, is a party to each stage of the grievance and arbitration procedure. The parties to the collective bargaining agreement are the South Carolina Stevedores Association and its employer members, on the one hand, and the union on the other. J.A. 36a. Indeed, it was undisputed that "[petitioner] is not a party to the Collective Bargaining Agreement." J.A. 55a. Under the agreement, a claim must first be referred to informal efforts at resolution by union and management. If such efforts are unsuccessful, the claim may be reduced to writing within 48 hours and presented to the Port Grievance Committee. Pet. App. 16a; see J.A. 43a. If that committee cannot

resolve the dispute, the union may refer it to a second grievance committee and then, if necessary, to compulsory arbitration. Pet. App. 16a n.1; J.A. 44a. There is no suggestion that, at any stage of the process, the individual employee can control access, determine the manner in which a claim is presented, or dictate minimum terms for settlement. In this case, for example, it appears that petitioner's claim did not proceed beyond the stage of informal resolution because "the union did not pursue the matter." Pet. App. 16a.

There are many legitimate reasons why a union might decline to pursue a claim in a collectively negotiated grievance procedure. The union may believe the claim has no merit; the union may believe that an employer has adequately remedied a claim by instituting new general procedures (even if the individual claimant has not been compensated); or the union may believe that pursuing other grievances more vigorously is in general more in the interest of members of the bargaining unit. See, *e.g.*, *Pryner* v. *Tractor Supply Co.*, 109 F.3d 354, 362 (7th Cir.) (noting that, in carrying out its duty of fair representation to its members, a union may take into account such "strategic factors" as "its limited resources and consequent need to establish priorities * * * as well as its desire to maintain harmonious relations among the workers and between them and the employer"), cert. denied, 118 S. Ct. 294 (1997). As in the case of contract negotiation, a union's prosecution of a grievance under the contract is governed not by the union's obligation to each individual member of the bargaining unit, but by the union's collective obligation to the bargaining unit members as a whole. As a result, a "union balancing individual and collective interests might validly permit some employees' statutorily granted * * * benefits to be sacrificed if an alternative expenditure of resources would result in increased benefits for workers in the bargaining unit as a whole." *Barrentine*, 450 U.S. at 742.

Leaving the prosecution of a statutory antidiscrimination claim in the control of the majoritarian union processes would be inconsistent with the intense focus on each individual's rights under federal antidiscrimination statutes. A union's decision to subordinate some of the individual employee's interests in full enforcement for the benefit of the bargaining unit as a whole would be entirely at odds with Congress's decision that each individual should have the right to attain the promise of equal employment opportunity in the nation's antidiscrimination laws. Accordingly, the union's control over the prosecution and settlement of a grievance in a collective bargaining arbitration procedure provides an additional reason why the existence of such a procedure does not vitiate the individual employee's rights to vindication of statutory antidiscrimination claims in federal court.

2. *Other Distinctions Between* Gilmer *and* Alexander *Also Suggest That This Case Is Controlled By* Alexander. In distinguishing *Alexander*, this Court in *Gilmer* identified two factors, in addition to the tension between individual statutory rights and collective representation, that supported enforcement of the arbitration provision in *Gilmer*. Neither of those factors is present in this case.

a. In *Gilmer*, the employee had agreed to arbitrate statutory claims, while *Alexander* and its progeny "did not involve the issue of the enforceability of an agreement to arbitrate statutory claims." *Gilmer*, 500 U.S. at 35. To the contrary, the Court explained, the employees in *Alexander* "had not agreed to arbitrate their statutory claims, and the labor arbitrators were not authorized to resolve such claims." *Ibid.*

Like the CBA in *Alexander*, the CBA in this case did not purport to cover statutory claims of discrimination.

The collective bargaining agreement provided that it "is intended to cover all matters affecting wages, hours, and other terms and conditions of employment." Pet. App. 4a. It does not state that statutory claims of discrimination are subject to the agreement's grievance and arbitration procedures, and there is no basis to infer that the parties intended that statutory claims should be subject to the contractual dispute resolution process. Like the CBA in *Gardner-Denver*, the CBA's arbitration provision reaches "only questions of contractual rights."[7] 415 U.S. at 53-54.

The court of appeals ruled that the language in the CBA was sufficient to encompass petitioner's ADA claim because the language was similar in scope to the arbitration language before this Court in *Gilmer*. Pet. App. 4a. That misses the point entirely. The agreement in *Gilmer* was an agreement between an *individual* and a securities exchange. In that context, it may be proper to view an agreement to arbitrate "[a]ny controversy * * * arising out of the employment or termination of employment" as embracing the individual's statutory claim of employment discrimination. 500 U.S. at 23. No such assumption can be made in the context of a collective bargaining agreement, where there is a long history of viewing the grievance and arbitration procedures as limited to the interpretation and application of the contractual rights embodied in the CBA. See *Alexander*, 415 U.S. at 49-54; cf. *Livadas* v.

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[7] The CBA contains a provision stating that "[i]t is the intention and purpose of all the parties hereto that no provision or part of this Agreement shall be violative of any Federal or State law." Pet. App. 17a. That provision, however, merely states that the parties are to carry out the agreement in a manner that does not violate the law. It does not obligate the union to pursue claims of statutory discrimination on behalf of a member and in no way suggests that the agreement's grievance and arbitration framework is an appropriate forum for resolving statutory claims of discrimination.

Bradshaw, 512 U.S. 107, 125 (1994) ("arbitration pledge" in CBA could not reasonably be understood as covering an individual's "state-law claims"); *Lingle* v. *Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 409-10 n.9 (1988) (CBA is not construed as applying to an individual's statutory rights absent "clear and unmistakable evidence" that the parties to the agreement so intended) (quoting *Metropolitan Edison Co.* v. *NLRB*, 460 U.S. 693, 708 (1983)).

b. The arbitration contract in *Gilmer* was governed by the Federal Arbitration Act (FAA), 9 U.S.C. 1 *et seq.* See 500 U.S. at 25 & n.2. The Court therefore applied the Act's "liberal federal policy favoring arbitration agreements," *id.* at 25, and the Court specifically distinguished *Alexander* and its progeny on the ground that "those cases were not decided under the FAA." *Id.* at 35.

In this case, as in *Alexander*, the collective bargaining agreement falls outside the FAA. It is widely understood that CBAs are excluded from the FAA as "contracts of employment" within the meaning of 9 U.S.C. 1.[8] See, *e.g.*, *Herring* v. *Delta Airlines, Inc.*, 894 F.2d 1020, 1023 (9th Cir.), cert. denied, 494 U.S. 1016 (1990); *Domino Sugar Corp.* v. *Sugar Workers Local Union 392*, 10 F.3d 1064, 1067 (4th Cir. 1993); *United Food & Commercial Workers* v. *Safeway Stores, Inc.*, 889 F.2d 940, 943-44 (10th Cir. 1989); *Lincoln Mills* v. *Textile Workers Union of America*, 230 F.2d 81, 86 (5th Cir. 1956), rev'd on other grounds, 353 U.S. 448 (1957); *Gatliff Coal Co.* v. *Cox*, 142 F.2d 876, 882 (6th Cir. 1944); see also *United Paperworkers Int'l Union* v. *Misco*, 484 U.S. 29, 40 n.9 (1987) (noting that the FAA did not apply to the arbitration

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[8] Section 1 of the FAA provides that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in * * * interstate commerce." 9 U.S.C. 1.

agreement at issue since the FAA "does not apply to 'contracts of employment of * * * workers engaged in foreign or interstate commerce'").[9] The CBA in this case thus falls within the scope of the Section 1 exclusion and is therefore not subject to the "federal policy favoring arbitration" under the FAA invoked in *Gilmer*.

The Fourth Circuit in *Austin* acknowledged that CBAs are within the Section 1 exclusion, but nonetheless concluded that "the federal labor policy encouraging arbitration of labor disputes as expressed in the *Steelworkers Trilogy*" was sufficient to require arbitration of an antidiscrimination claim. 78 F.3d at 883 n.2. That view is mistaken. The *Steelworkers Trilogy* was decided prior to *Alexander*. After citing and discussing the *Trilogy*, the Court in *Alexander* concluded that the *Trilogy* "does not establish that an arbitrator's resolution of a contractual claim is dispositive of a statutory claim under Title VII." 415 U.S. at 46 n.6. The same conclusion follows here.

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[9] A number of courts have taken the view, outside the context of collective bargaining agreements, that the Section 1 exclusion applies only to the contracts of workers who are directly involved in the transportation of goods in interstate commerce. See, *e.g.*, *Great Western Mortgage Corp.* v. *Peacock*, 110 F.3d 222, 227 (3d Cir.), cert. denied, 118 S. Ct. 299 (1997); *Rojas* v. *TK Communications, Inc.*, 87 F.3d 745, 748 (5th Cir. 1996). The better view of the exclusion is that it broadly covers all employment contracts otherwise subject to the reach of the Act. See *Gilmer*, 500 U.S. at 39-41 (Stevens, J., dissenting); Matthew W. Finkin, *"Workers' Contracts" Under The United States Arbitration Act: An Essay In Historical Clarification*, 17 Berkeley J. Empl. & Lab. L. 282 (1996). In any event, this case involves an agreement that covers workers whose very job is to help move goods in interstate commerce. The CBA thus falls outside the FAA, even under the most narrow view of the Section 1 exclusion.

C. Provisions In Federal Antidiscrimination Statutes Encouraging Knowing And Voluntary Use Of Alternative Means Of Dispute Resolution Do Not Authorize Use Of Such Means Where A Union—But Not The Claimant—Has Purportedly Agreed To Waive Statutory Judicial Remedies

In reaching the conclusion that this Court's decision in *Alexander* no longer precludes a union from waiving an employee's remedies under federal antidiscrimination statutes, the Fourth Circuit in *Austin* relied heavily on provisions of Title VII and the ADA stating that:

> Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including * * * arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title.

Civil Rights Act of 1991, Pub. L. No. 102-166, § 118, 105 Stat. 1081 (Title VII); see also 42 U.S.C. 12212 (ADA). See *Austin*, 78 F.3d at 881. The court of appeals repeatedly referred to that provision in justifying its decision that a general arbitration clause in a collective bargaining agreement bars an employee covered by the contract from filing a lawsuit under a federal anti-discrimination statute.

1. The language on which the Fourth Circuit relied does not support its conclusion that Congress intended to permit waiver of statutory antidiscrimination rights in collective bargaining agreements. At the time Congress acted, it had been clear at least since *Alexander* was decided that arbitration was not "authorized by law" simply because a collective bargaining agreement purported to establish arbitration as an exclusive means for resolving employment-related disputes. Accordingly, although the cited statutory provisions do in terms "encourage" arbitration or other means of alternative dispute resolution where the parties to the dispute—the employer and the individual employee—have knowingly and voluntarily agreed to pursue those means, the provisions do not support the Fourth Circuit's conclusion that arbitration should be imposed where the employee has never expressly agreed to substitute arbitration for a federal judicial remedy.[10]

2. The legislative history of the provisions makes it quite clear that Congress intended to encourage arbitration only where an individual voluntarily chooses to submit his claim to arbitration in the context of an existing dispute or claim. As the Conference Report on the ADA states: "It is the intent of the conferees that the use of the alternative dispute resolution procedures is completely voluntary. Under no condition would an arbitration clause in a *collective bargaining agreement or employment contract* prevent an individual from pursuing

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[10] The Court in *Gilmer* recognized that courts should be careful to enforce only free and voluntary agreements to arbitrate antidiscrimination claims. See *Gilmer*, 500 U.S. at 33 (referring to employee's status as "an experienced businessman" and noting that there was "no indication" that he "was coerced or defrauded into agreeing to the arbitration clause"). The Court cautioned that "courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds for the revocation of any contract." *Ibid*. (internal quotation marks omitted). And, by stating that any "claim of unequal bargaining power is best left for resolution in specific cases," *ibid*., the Court necessarily suggested that there may be cases in which there is such inequality between employer and employee that an agreement to arbitrate—even by an individual employee—would not be enforceable.

their rights under the ADA." H.R. Conf. Rep. No. 596, 101st Cong., 2d Sess. 89 (1990).[11]

The report of the House Committee of the Judiciary further elucidates Congress' intent with respect to the use of arbitration. The Report again states that arbitration, when required under a collective bargaining or employment agreement does not preclude an individual from pursuing his statutory claim in court under the enforcement provisions of the ADA:

> The Committee wishes to emphasize * * * that the use of alternative dispute resolution mechanisms is intended to supplement, not supplant, the remedies provided by this Act. Thus, for example, the Committee believes that any agreement to submit disputed issues to arbitration, *whether in the context of a collective bargaining agreement or in an employment contract*, does not preclude the affected person from seeking relief under the enforcement provisions of this Act. This view is consistent with the Supreme Court's interpretation of title VII of the Civil Rights Act of 1964, whose remedial provisions are incorporated in [the ADA]. The Committee believes that the approach articulated by the Supreme Court in *Alexander v. Gardner-Denver Co.* applies equally to the ADA and does not intend that the inclusion of [the section on alternative dispute resolution] be used to preclude rights and remedies that would otherwise be available to persons with disabilities.

H.R. Rep. No. 485, 101st Cong., 2d Sess., Pt. 3, at 76-77 (1990) (emphasis added); see *LaChance* v. *Northeast Pub.,*

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[11] Because the agreement to arbitrate in *Gilmer* was not made in the context of an employment contract, see 500 U.S. at 25 n.2, this statement is consistent with the Court's decision in *Gilmer* one year later.

Inc., 965 F. Supp. 177, 187 (D. Mass. 1997) (Though "Congress wanted to encourage arbitration of ADA claims, it also clearly intended that aggrieved individuals retain the right to pursue a claim in a judicial forum.").

Congress expressed the same view in the Civil Rights Act of 1991 (CRA), enacted just one year after the ADA. In Section 118 of the CRA, Congress addressed the issue of arbitration with respect to "the Acts or provisions of Federal law amended by this title" (which included Title VII, the ADA, and the ADEA). See § 118, 105 Stat. 1081 (42 U.S.C. 1981 note). Congress again stated that it "encouraged" the "use of alternative means of dispute resolution," including arbitration, but only "[w]here appropriate and to the extent authorized by law." *Ibid.*[12] As with the ADA, the Committee Report stated:

> The Committee emphasizes * * * that the use of alternative dispute resolution mechanisms is intended to supplement, not supplant, the remedies provided by Title VII. Thus, for example, the Committee believes that any agreement to submit disputed issues to arbitration, whether in the context of a collective bargaining agreement or in an employment contract, does not preclude the affected person from seeking relief under the enforcement provisions of Title VII. This view is consistent with the Supreme Court's interpretation of

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[12] In commenting on Section 118, the Act's sponsors emphasized that only a knowing and voluntary agreement to arbitrate would be enforceable. See 137 Cong. Rec. H9530 (daily ed. Nov. 7, 1991) (statement of Rep. Edwards) (arbitration provision of CRA "contemplates the use of voluntary arbitration to resolve specific disputes *after they have arisen*, not coercive attempts to force employees in advance to forego statutory rights") (emphasis added); 137 Cong. Rec. S15,478 (daily ed. Oct. 30, 1991) (statement of Sen. Dole) (arbitration is encouraged only "where the parties knowingly and voluntarily elect to use these methods").

> Title VII in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974). The Committee does not intend this section to be used to preclude rights and remedies that would otherwise be available.

H.R. Rep. No. 40, 102d Cong., 1st Sess. Pt. 1, at 97 (1991).[13]

In short, far from attempting to limit or alter the settled understanding that derived from this Court's decision in *Alexander*, Congress sought to encourage arbitration in cases in which the individual employee and employer both determined that arbitration was an appropriate dispute resolution mechanism. Neither the language of the cited amendments nor their purposes would be consistent with requiring arbitration of such disputes, and precluding an employee from invoking a statutory federal judicial remedy, in a case in which the individual employee had never made such a determination.

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[13] Congress has made explicit that procedural rights under the ADEA may not be waived in any pre-dispute agreement—even in an individual contract. The Older Workers Benefit Protection Act (OWBPA), Pub. L. No. 101-433, § 202, 104 Stat. 984, provides minimal standards for determining when a waiver of "*any* right or claim under [the ADEA]," 29 U.S.C. 626(f)(1) (emphasis added), is "knowing and voluntary" and, thus, enforceable. See *Gilmer*, 500 U.S. at 28 n.3. A waiver is not considered knowing and voluntary if the individual waives "rights or claims that may arise after the date the waiver is executed." 29 U.S.C. 626(f)(1)(C). The OWBPA extends to the waiver of the right to a de novo (jury) trial in district court. See 29 U.S.C. 626(c); accord S. Rep. No. 79, 101st Cong., 1st Sess. 13 (1989) (stating that the OWBPA was needed, in part, to ensure that individuals would not be forced into ceding away such procedural "protections" as the right to a jury trial), incorporated by reference in S. Rep. No. 263, 101st Cong., 2d Sess. 15 (1990); H.R. Rep. No. 664, 101st Cong., 2d Sess. 24 (1990) (same); see also S. Rep. No. 79, *supra*, at 9 (citing congressional concern with the "preemptive waiver of rights [that] occurs before a dispute has arisen and indeed before an employee is even aware of any potential or actual pattern of discrimination"). The OWBPA did not govern the arbitration agreement in *Gilmer* because the claim in that case arose prior to the enactment of the OWBPA. See § 202, 104 Stat. 984 (stating that the waiver provisions of the OWBPA "shall not apply with respect to waivers that occur before the date of enactment of this Act").

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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No. 97-889

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

CEASAR WRIGHT,
Petitioner,
v.

UNIVERSAL MARITIME SERVICE CORP.;
STEVENS SHIPPING & TERMINAL COMPANY;
STEVEDORING SERVICES OF AMERICA;
RYAN-WALSH, INC.;
STRACHAN SHIPPING COMPANY;
CERES MARINE TERMINALS, INC.; and
SOUTH CAROLINA STEVEDORES ASSOCIATION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE NATIONAL ACADEMY OF ARBITRATORS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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20 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST AND CONCERN OF THE AMICUS........ 1

SUMMARY OF ARGUMENT 4

ARGUMENT 5

I. UNLIKE THE ISSUE IN OTHER RELATED CASES, THE ISSUE IN THIS CASE IS THE PROPER FUNCTION OF A COURT IN INTERPRETING THE ARBITRATION PROVIION OF A COLLECTIVE BARGAINING AGREEMENT WHEN A CLAIMANT BRINGS SUIT FOR VIOLATION OF AN ANTI-DISCRIMINATION STATUTE 5

II. WHEN THE ARBITRATION PROVISION IN A COLLECTIVE AGREEMENT IS URGED AS A BAR TO DIRECT SUIT BY AN EMPLOYEE FOR VIOLATION OF AN ANTI-DISCRIMINATION STATUTE THE PRESUMPTION OF ARBITRABILITY IS INAPPLICABLE 8

III. WHETHER A COLLECTIVE BARGAINING AGREEMENT CAN WAIVE AN EMPLOYEE'S RIGHT TO SUE FOR VIOLATION OF AN ANTI-DISCRIMINATION STATUTE NEED NOT BE DECIDED UNLESS A COURT FIRST FINDS THAT THE AGREEMENT MAKES SUCH CLAIMS ARBITRABLE AND A COURT SHOULD NOT SO FIND UNLESS THE AGREEMENT EXPLICITLY SO PROVIDES 12

CONCLUSION 15

TABLE OF AUTHORITIES

Cases Page

Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) ... 6, *passim*
American Manufacturing, 363 U.S. 564 (1960) ... 11
Atkinson v. Sinclair Refining Co., 370 U.S. 238 (1962) ... 11
AT&T Technologies v. Communications Workers, 475 U.S. 643 (1986) ... 11, 14
Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875 (4th Cir. 1996) *cert. denied*, 117 S. Ct. 432 (1996) ... 7, *passim*
Drake Bakeries Local 50, 370 U.S. 254 (1962) ... 11
Duffield v. Robertson Stephens & Co., No. 97-15698 ... 6
First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995) ... 5, 12, 14
Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) ... 6
LaChance v. Northwest Publishing, Inc., 965 Supp. 177 (D. Mass. 1997) ... 6
Pryner v. Tractor Supply Co., 109 F.3d 354 (7th Cir. 1997) *cert. denied* 118 S. Ct. 294 (1997) ... 7, *passim*
Republic Steel Co. v. Maddox, 379 U.S. 650 (1965) ... 7, *passim*
Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 965 F. Supp. 797 (D. Mass. 1997) ... 6
Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960) ... 6, *passim*

Statutes

Labor Management Relations Act, 1947 § 301, 29 U.S.C. 185 ... 6
Federal Arbitration Act, 9 U.S.C. §§ 1-16 ... 6

Other Authoriites

Abernethy, *The Presidential Address*, in Arbitration, Promise and Performance, Proceedings of the 36th Annual Meeting, National Academy of Arbitrators (1984) 13 ... 2

TABLE OF AUTHORITIES—Continued

Page

Slichter, Healy & Livernash, *The Impact of Collective Bargaining on Management* 756 (1960) ... 8
St. Antoine, Judicial Review of Labor Arbitration Awards: A Second Look at *Enterprise Wheel* and its Progeny, 75 Mich. L. Rev. 1137, 1138-40 (1977) ... 9

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OCTOBER TERM, 1997

No. 97-889

CEASAR WRIGHT,
Petitioner,
v.
UNIVERSAL MARITIME SERVICE CORP.;
STEVENS SHIPPING & TERMINAL COMPANY;
STEVEDORING SERVICES OF AMERICA;
RYAN-WALSH, INC.;
STRACHAN SHIPPING COMPANY;
CERES MARINE TERMINALS, INC.; and
SOUTH CAROLINA STEVEDORES ASSOCIATION,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

BRIEF OF THE NATIONAL ACADEMY OF ARBITRATORS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST AND CONCERN OF THE AMICUS[1]

The National Academy of Arbitrators, founded in 1947, is a professional organization of neutrals. Candidates for membership must be elected by a two-thirds vote of the members at its annual meetings after careful consideration of their qualifications by its membership Committee. To be considered for membership an arbitrator must demonstrate acceptability by management and labor through substantial and current experience as impartial arbitrator of labor-management disputes (at a bare minimum 50 cases within 5 years with a variety of parties) or, as an exception, have obtained general recognition through scholarly publication or other activities as an impartial authority in labor-management relationships. Members are prohibited from serving as advocates for either labor or management. Currently the Academy has 651 American and Canadian members.

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[1] **Rule 37.6 statement: Counsel of record is the author if this brief. No person or entity other than the National Academy of Arbitrators has made any monetary contribution to the preparation or submission of this brief.**

The Academy's principal purposes, set out in its constitution are "to establish and foster the highest standards of integrity, competence, honor and character among those engaged in the arbitration of labor-management and employment disputes on a professional basis; to secure the acceptance of and adherence to the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes . . .; to promote the study and understanding of arbitration of labor-management and employment disputes." Its function was best described by its president in 1983:

> "The dominant commitment of this Academy throughout its history has been to the advancement of arbitration, not to the advancement of arbitrators. That essential ingredient of true professionalism, a keen and controlling sense of social responsibility—a sense of social responsibility for advancing desirable goals lying outside and beyond one's personal or group interests—has motivated this Academy and its dedicated and committed leadership throughout its history.[2]

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[2] Abernethy, ***The Presidential Address***, in Arbitration, Promise and Performance, Proceedings of the 36th Annual Meeting, National Academy of Arbitrators (1984) 13.

The Academy is the co-author and principal enforcer of an ethical code, the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes, that has been adopted by the American Arbitration Association and the Federal Mediation and Conciliation Service. The proceedings of the annual meeting of the Academy are published by the Bureau of National Affairs and constitute the most authoritative collection in existence of materials in the labor arbitration process.

The traditional function of labor arbitration was to resolve disputes between management and labor primarily involving questions of interpretation and application of the terms of collective bargaining agreements (grievance arbitration) but also at times involving questions as to what the terms and conditions of new agreements should be (interest arbitration). Arbitration of disputes as to the application and interpretation of statutes protecting individual employees against specified forms of employment discrimination was not traditionally a function of labor arbitration. Recognizing that such arbitration has, however, become part of the American landscape the Academy has amended its constitution and by-laws to encompass study and educational activity with respect to employment arbitration, although it has continued to limit its membership to those accomplished in traditional grievance arbitration.

The Academy's interest in this case is in protecting the status and respect which the institution of grievance arbitration has achieved. It may seem odd that arbitrators should object to a decision which enlarges their jurisdiction to cover disputes not only as to the interpretation and application of the terms of collective agreements but also statutes. We in fact have no objection to such enlargement if it is genuinely the intention of the parties to confer that jurisdiction. Arbitrators under collective bargaining agreements are usually willing to decide whatever disputes the parties submit to them. In the present case, however, as well as in a number of related cases, arbitration is not being invoked by the parties to a collective bargaining agreement in order to get a statutory dispute resolved. It is being invoked as a defense against adjudication of a claim by an individual in the absence of any evidence that the parties to the collective bargaining agreement intended that such claims be arbitrated.

In these cases the courts, we believe, are erroneously applying a presumption of arbitrability, sometimes without saying so in a context in which it is inapplicable. In so doing they have converted arbitration, which has been recognized as a relatively efficient and efficacious method of protecting individual employees, into an obstacle that prevents employees from vindicating their rights. Because we believe that such decisions tarnish and diminish, rather than augment, the labor arbitration process we submit this brief in support of the petitioner.

The parties have consented to the filing of this amicus brief. Their letters have been filed with the clerk.

SUMMARY OF ARGUMENT

Although the issue in this case is related to the cases in conflict that were presented by the petition for certiorari, it is different. The issue directly involved is the proper function of a court in interpreting the arbitration provision in a collective bargaining agreement when it is urged as a bar to a suit claiming a violation of an antidiscrimination statute.

The courts below in this case correctly assumed that they should determine arbitrability of the statutory claim but leapt to an inference, based on the lack of the usual language limiting the arbitrator to interpretation and application of the collective bargaining agreement, that every public law question was arbitrable under the agreement. In so doing they implicitly applied the presumption

of arbitrability in Section 301 cases that is applicable where the contestants are labor and management. That presumption is inapplicable where the availability of arbitration is raised as a bar to the prosecution of a suit to vindicate employee statutory protections against discrimination.

The appropriate presumption is the obverse: In such a suit the correct rule is that of *First Options of Chicago, Inc. v. Kaplan*. A court should not conclude that the parties to a collective agreement agreed to arbitrate public law disputes so as to bar direct suit by a plaintiff unless there is clear and unmistakable evidence that they intended to vest power in the arbitrator to decide such disputes.

Such a rule resolves this case and, as well, those cases in which courts have assumed that the plaintiff's claim was arbitrable but then went on to differ as to whether, that being so, recourse must be had to the arbitration procedure. Unless the rule we propose is adopted and the decision of the court below reversed the status of grievance arbitration as a useful instrument in preventing industrial strife and protecting employee rights will be diminished, not enhanced.

ARGUMENT

I. UNLIKE THE ISSUE IN OTHER RELATED CASES, THE ISSUE IN THIS CASE IS THE PROPER FUNCTION OF A COURT IN INTERPRETING THE ARBITRATION PROVISION OF A COLLECTIVE BARGAINING AGREEMENT WHEN A CLAIMANT BRINGS SUIT FOR VIOLATION OF AN ANTIDISCRIMINATION STATUTE.

Before stating our views on the issue before the Court it is important to carefully define that issue. The first step in that definition is to describe the relationship between the issue in this case and other cases involving the arbitration of employee statutory claims.

1. This case is *not* about the applicability of the Federal Arbitration Act decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), to the Americans With Disabilities Act or Title VII. There are serious questions about the applicability of *Gilmer* to the ADA and Title VII under the FAA. See the opinions of the United States District Court for Massachusetts in *LaChance v. Northwest Publishing, Inc.*, 965 Supp. 177 (D. Mass. 1997) and *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 965 F. Supp. 797 (D. Mass. 1997) and 76 FEP Cases 681 (1998).[3]

The Court need not address those questions in this case because it involves grievance arbitration under Section 301 of the Labor Management Relations Act of 1947. Although both the FAA and Section 301 involve arbitration, different considerations apply under the two statutes. Arbitration under Section 301, as this Court has recognized, is a substitute for the strike as a method of resolving disputes as to the proper application of a collective bargaining agreement. Arbitration under the Federal Arbitration Act, to the contrary, is a substitute for litigation. Different considerations apply in determining whether arbitration can be compelled where the alternative is litigation, as in *Gilmer*, than are applicable where, as in *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), the arbitration provision is a substitute for the strike.

2. The issue in this case is related to, but is not exactly the same as, the question decided in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). The issue there was whether an arbitration decision finding no violation of the no-discrimination clause in a collective bargaining agreement prevented a plaintiff from pursuing his claim that there had been a violation of the anti-discrimination provisions of Title VII. This Court held that the decision on the contractual claim did not bar a law suit on the claim of statutory violation, even though the facts bearing on the two claims might be the same. "[A] contractual right to submit a claim to arbitration is not displaced simply because Congress also has provided a statutory right against discrimination. Both rights have legally independent origins. . . . Thus the arbitrator has authority to resolve only questions of contractual rights, and this authority remains regardless of whether certain contractual rights are similar to, or duplicative of, the substantive rights secured by Title VII." 415 U.S. at 52-53. Alexander did not have two bites at the apple. He had two apples. The Fourth Circuit in this case held that Ceasar Wright had only one apple, the collective bargaining agreement.

3. Nor is the issue in this case exactly the same as, although it is related to, the issue on which the courts of appeal are divided in such cases as *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 432 (1996); *Pryner v. Tractor Supply Co.*, 109 F.3d 354 (7th Cir. 1997), *cert. denied*, 118 S. Ct. 294 (1997), and the other cases listed on page 10 of the petition for certiorari in this case, which will hereinafter be referred to as the *Austin-Pryner* conflict. Those cases, unlike *Gilmer*, did arise under Section 301 and did involve collective bargaining rather than commercial agreements. But the issue in those cases was whether a non-discrimination clause in a collective bargaining agreement should be read as incorporating into the agreement by reference the federal law prohibiting discrimination, thus bringing into play the rule of *Republic Steel Co. v. Maddox*, 379 U.S. 650 (1965): a claim of violation of a provision in a collective bargain-

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[3] With respect to individual agreements, the Academy has adopted a statement of policy opposing mandatory arbitration as a condition of employment when it requires waiver of direct access to a judicial forum. The Academy has also filed an amicus brief in a pending case in the Ninth Circuit, *Duffield v. Robertson Stephens & Co.*, No. 97-15698, opposing enforcement of the arbitration requirement in a stock exchange registration form in a suit brought under Title VII. None of those issue need be addressed in this case.

ing agreement providing for arbitration must be arbitrated rather than sued on. There isn't any discrimination provision in the contract in this case. Nor did the courts below in this case even purport to require arbitration of petitioners claim under the Americans With Disabilities Act because the agreement incorporated it by reference, as was the case in *Austin*. They relied, rather, on the arbitration provision. The arbitration clause, the Court of Appeals held, covered all disputes affecting wages, hours and other terms and conditions of employment and, hence, covered a dispute arising under the ADA even if not incorporated in the agreement. The real issue in this case, then, is as to the proper function of a court in interpreting the arbitration provision in a collective bargaining agreement, when it is urged as a bar to a suit claiming a violation of an anti-discrimination statute.

II. WHEN THE ARBITRATION PROVISION IN A COLLECTIVE AGREEMENT IS URGED AS A BAR TO DIRECT SUIT BY AN EMPLOYEE FOR VIOLATION OF AN ANTI-DISCRIMINATION STATUTE THE PRESUMPTION OF ARBITRABILITY IS INAPPLICABLE.

The agreement in this case is atypical. Most American collective bargaining agreements, like the agreements involved in *Gardner-Denver* and in the *Austin-Pryner* conflict, give an arbitrator the authority only to interpret and apply the provisions of the collective bargaining agreement. Many agreements do, indeed, make all disputes eligible for processing in the grievance procedure. But, they usually expressly limit arbitration to disputes involving the interpretation or application of the collective bargaining agreement.[4] The arbitrator, as this Court has said in *Gardner-Denver*, is "the proctor of the bargain . . . His source of authority is the collective bargaining agreement,

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[4] Slichter, Healy & Livernash, *The Impact of Collective Bargaining on Management* 756 (1960).

and he must interpret and apply that agreement. . . ." 415 U.S. at 53. Or, as the then Dean of the University of Michigan Law School put it, the arbitrator is the parties' "contract reader."[5]

In this case there is no explicit limitation in the arbitration provision. The agreement says that "matters under dispute" not settled in the grievance procedure are to be submitted to arbitration. J.A. 43a. This provision, when coupled with the statement in the agreement that it is intended to cover all matters affecting "wages, hours and other terms and conditions of employment" was read by the Court of Appeals to encompass any claim of violation of public law dealing with wages, hours or conditions of employment, even though not dealt with in the agreement, thus precluding suit by the petitioner of his claim of violation of the Americans With Disabilities Act.

This is a breathtaking inference from the absence of an explicit statement of the usual understanding that the arbitrator is confined to questions of interpretation and application of the agreement! How far does that inference reach? If it encompasses claims arising under the Americans with Disabilities Act, does it encompass all public laws? The National Labor Relations Act? If an employer claims that observance of a picket line (permitted under Section 15(A)(1) of the agreement) constitutes a secondary boycott, must the employer submit the claim to arbitration? Does the arbitration provision encompass a claim under South Carolina's Workers' Compensation Act? Should the plaintiff have been required to pursue his compensation claim through arbitration rather than before the Industrial Commission, as he in fact did? And what is the statute of limitations? The grievance procedure, in Section 15(B), says that a grievance must be filed within 48 hours after "such discussions."[6] Does this mean that the union has waived the two-year period for the filing of an action under the Fair Labor Standards Act or the 180/300-day limitation period in Title VII and, by incorporation, in the Age Discrimination in Employment Act?

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[5] St. Antoine, Judicial Review of Labor Arbitration Awards: A Second Look at *Enterprise Wheel* and its Progeny, 75 Mich. L. Rev. 1137, 1138-40 (1977).

The courts below concluded that the petitioner's ADA claim was arbitrable without asking such questions. They leapt to this inference in the absence of testimony from either the employer or the union as to the history of the arbitration provision and as to their past practice under it, or as to whether both parties—who, after all, adopted their agreement in light of *Gardner-Denver*—really intended to give the arbitrator the power not only to apply public laws relating to wages, hours, and conditions of employment, but also to order all of the remedies provided by public law. Indeed, the only evidence before the trial court as to the understanding of the union—the other party to the arbitration provision—was that the union believed that petitioner's claim was not subject to the grievance arbitration provision. The Local President, after protesting the employer's action did not file a grievance but, implicitly recognizing that petitioner's claim of violation of ADA was not subject to arbitration, advised the petitioner to pursue his statutory claim in court.[7]

The failure of the court below to ask these kinds of questions would have been entirely proper if this were a contest between the union and the employer as to arbitrability. In the usual case in which that is an issue the contestants before the court are the parties to the agreement. In cases brought under Section 301 the parties to the litigation are the employer and the union. In most such cases the union seeks to compel arbitration, as in *American Manufacturing* 363 U.S. 564 (1960) and *Warrior & Gulf*, against the opposition of the employer. In others, such as *Drake Bakeries Local 50*, 370 U.S. 254 (1962) and *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238 (1962) the employer seeks damages from the union for breech of the no-strike clause and the union argues that the claim must be arbitrated. In the 301 cases the rule is clear. Unless the parties explicitly provide otherwise, substantive arbitrability is a question for a court, not the arbitrator. *AT&T Technologies v. Communications Workers*, 475 U.S. 643 (1986). But, as this Court held in *Warrior & Gulf*, "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." 363 U.S. at 582-583.

Therein lies the rub—and implicitly the answer. That answer resolves this case and also resolves the *Austin-Pryner* conflict. This suit, unlike those but like *Austin* and *Pryner*, is not a suit between parties to a contract in which the parties disagree as to whether the agreement between them requires arbitration of a dispute. It is a suit brought under an anti-discrimination statute by an employee against the employer in which the employer alone asserts that the agreement with the union requires that the claim be arbitrated by the union. In that kind of a case, we submit, the Section 301 rules about substantive arbitrability are simply inapplicable. The applicable principle is not found in *Warrior & Gulf*, but in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), as we demonstrate below. First, however, it is important to distinguish between our contention and the rationale of the decisions that have relied on, or distinguished, *Alexander v. Gardner-Denver*.

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[6] What discussions? There seems to be no antecedent provision requiring discussions other than the discussions as to the payment of employer assessments, contributions, and other required payments to the "fund" in the preceding Section 15(A)(2). It is possible that the omission of any limitation on the arbitrator's jurisdiction was just as inadvertent as the omission of the provision for prior discussions. Indeed, the entire agreement appears to be a patchwork of provisions some of which were lifted from other agreements and thus are self-contradictory. Thus the agreement provides in section 13(D)(6) that "the Employer also reserves the right to . . . discharge (J.A. 38a) without any limitation as to just cause but then deals in Section 15(A) with "any decision in favor of the employee involving . . . discharge." (J.A. 45a).

[7] That this advice did not reflect any tension between the union and the petitioner is shown by the fact that after the Fourth Circuit's decision in *Austin*, the union did file a grievance on petitioner's behalf. See footnote 1 on page 6 of the petition for certiorari.

III. WHETHER A COLLECTIVE BARGAINING AGREEMENT CAN WAIVE AN EMPLOYEE'S RIGHT TO SUE FOR VIOLATION OF AN ANTI-DISCRIMINATION STATUTE NEED NOT BE DECIDED UNLESS A COURT FIRST FINDS THAT THE AGREEMENT MAKES SUCH CLAIMS ARBITRABLE AND A COURT SHOULD NOT SO FIND UNLESS THE AGREEMENT EXPLICITLY SO PROVIDES.

One possible answer to the question posed in this case and, as well as in the *Austin-Pryner* conflict, is that even if a collective bargaining agreement specifically incorporates a public law such as the ADA or Title VII it cannot waive an individual employee's right to resort directly to the judicial remedy provided by the statute. That, as we read them, is the rationale of the cases on the *Pryner* side of the *Pryner-Austin* conflict. They read *Gardner-Denver* as requiring that result. The Fourth Circuit disagreed on that issue in *Austin* and, implicitly, in this case. For the reasons set forth earlier, we do not believe that *Gardner-Denver* is the dispositive case. It simply decided that the result of an arbitration decision as to a no-discrimination contractual claim did not bar an employee from seeking to enforce a statutory prohibition. Only in a footnote did the opinion indicate, as a "further concern" that there might be tension between the employee's interest and that of the union.[8]

The critical issue in these cases as well as in the present case—the focal question—should be: Does the particular

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[8] 415 U.S. at 58, fn. 19.

collective bargaining agreement authorize an arbitrator to interpret and apply the public law that the employee seeks to enforce and authorize the arbitrator to provide the remedies provided by the statute? Antecedent to that focal question is the issue of who is to decide it and what principle is to govern the decision. Only if there is an affirmative answer to the focal question is it necessary to reach the posterior issue, dealt with in *Pryner* and similar cases: whether that authorization bars the plaintiff from directly using the forum provided by the statute involved.

A collective agreement may, of course, explicitly incorporate a statute and explicitly provide for arbitration of a claim arising under a statute. An example is the contract provision proposed in 1975 by the then General Counsel of the International Union of Electrical Workers expressly giving the arbitrator under a collective bargaining agreement the authority to apply Title VII and other anti-discrimination laws and, as well, the authority to award any remedy which could be granted by a court, including such changes in the agreement as necessary to comply with the statutes.[9] Where there is such a provision the answer to the focal question is "yes." If there is doubt about it a court should resolve it. Only if there is an affirmative answer does the question then arise as to whether the court should apply the rule of *Republic Steel v. Maddox* so as to require an employee to arbitrate or, instead, should rely on *Gardner-Denver* for the opposite result.

There is no explicit incorporation of statutory law in this case. The arbitration provision is ambiguous. The real issue therefore is as to the antecedent question: the standard a court should apply in determining whether the collective agreement is intended to make statutory issues arbitrable so as to bring into question the *Maddox* principle. The correct rule, we believe, and the one which we urge the Court to adopt, is the precise opposite of the presumption of substantive arbitrability for labor disputes which this Court announced in *Steelworkers v. Warrior & Gulf*. That presumption is simply not applicable where the dispute is not between the parties to a collective agreement over the interpretation of the substantive provisions of their agreement but is, rather, a dispute between an employee and an employer as to the application of a public law forbidding discrimination.

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[9] Newman, *Post-Gardner Developments in the Arbitration of Discrimination Claims*, in Arbitration—1975, Proceedings of the 28th Annual Meeting of the National Academy of Arbitrators (BNA, 1976) 57.

In *Warrior & Gulf*, this Court, in announcing the presumption of arbitrability under Section 301 said in justification of its conclusion: "The labor arbitrator performs functions which are not normal to the courts; the considerations which help him fashion judgments may indeed be foreign to the competence of the courts." 363 U.S. at 581. And as the Court repeated in *AT&T Technologies, Inc. v. Communications Workers of America*, the "presumption or arbitrability for labor disputes recognizes the greater institutional competence of arbitrators in interpreting collective bargaining agreements." 475 U.S. at 650. That presumption is simply inapplicable where the question is not the interpretation of the substantive provision of a collective bargaining agreement but the interpretation and application of a statute. Applying statutory law, not the collective agreement or the common law of the shop, is not the normal practice of labor arbitrators and they are not normally chosen for their expertise in the law. Indeed many of them are not lawyers.

When it is contended that a claimant under an anti-discrimination statute is barred from suing because he is required to arbitrate under a collective bargaining agreement, the appropriate principle is that announced by the Court in dealing with a similar question: whether an agreement should be read as giving an arbitrator the authority to decide arbitrability. "Courts should not assume that the parties agreed to arbitrate arbitrability unless

there is 'clear and unmistakable' evidence that they did so." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. at 944. Paraphrasing that statement, in cases brought under an anti-discrimination statute courts should not assume that the parties to a collective bargaining agreement agreed to arbitrate public law issues unless there is clear and unmistakable evidence that they did so.

In *First Options* this Court said that courts should "hesitate to interpret silence or ambiguity in 'who should decide arbitrability' as giving arbitrators that power, for doing so might often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide." 514 U.S. at 945. This is even more true when the question of arbitrability of a statutory claim is raised as a defense in an employee's suit because the consequence is not arbitration at all but, as in this case, the death of the claim because the time for filing a grievance has expired.

As labor arbitrators we are obviously interested in protecting and advancing the institution of grievance arbitration. We believe that it has served the interests of unions, employers and employees as an efficacious method of resolving workplace disputes and avoiding industrial strife. We also believe that a decision such as the one below does not advance the cause of grievance arbitration but, rather, diminishes it. We urge the Court to adopt the principle suggested in this brief to avoid that result.

CONCLUSION

For the reasons set forth, we urge the Court to reverse the decision below and to declare that, in suits brought by employees to enforce statutory protections, collective bargaining agreements should not be found to require arbitration of such claims unless they clearly and explicitly so provide.

Respectfully submitted,

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BRIEF *AMICI CURIAE* OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, NOW LEGAL DEFENSE & EDUCATION FUND, ASSOCIATION OF TRIAL LAWYERS OF AMERICA, DISABILITY RIGHTS EDUCATION & DEFENSE FUND, INC., and NATIONAL PARTNERSHIP FOR WOMEN AND FAMILIES IN SUPPORT OF PETITIONER

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46 pp

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES v

INTEREST OF THE *AMICI CURIAE* 1

INTRODUCTION & SUMMARY OF ARGUMENT 1

LEGAL ARGUMENT 3

A. Public Policy Does Not "Favor" Arbitration of Statutory Claims 3

  1. The Historic and Constitutional Roots of Public Policy 3

    a. The Declaration of Independence 3

    b. Article III of the Constitution 3

    c. The Bill of Rights 4

  2. The Public Policy Underlying the Civil Rights Laws 4

    a. Title VII 4

    b. The Americans with Disabilities Act 6

  3. The Federal Arbitration Act Did Not—And Could Not—Create A Public Policy "Preferring" Arbitration Over Litigation 7

  4. Especially Where The Employment Relationship Is One of Unequal Bargaining Power, Public Policy Does Not Favor Permitting Coercive Arbitration Agreements Which Threaten Statutory Protections . . 9

5. This Court Has Recognized That Any "Policy" In Favor of Arbitration Only Exists With Respect to the Scope of Arbitration Agreements Which Have Been Entered Into "Voluntarily" 11

B. Mandatory Arbitration Is Not "Just Another Forum" For Resolution of Statutory Claims 12

1. Employees Lose The Substantive Right to Have the Statutory Employment Laws Enforced Correctly, Since Arbitrators Are Not Obligated To Follow Or Apply The Law, And Arbitrators' Decisions Are Virtually Unreviewable 13

a. Arbitrators Are Sometimes Expressly Instructed That They Are Not Obligated To Follow Statutory Law 13

b. The Applicable Standard of Review Makes It Virtually Impossible to Overturn Arbitrators' Errors of Law 14

c. Since Arbitrators Often Give No Written Explanation or Opinion For Their Award, Overturning The Award Is Virtually Impossible 15

2. The Costs To An Employee To Vindicate His or Her Rights Are Exorbitant 16

3. In Arbitration, Significantly Limited Discovery Unfairly Burdens Employees Attempting to Vindicate Statutory Rights 18

4. Employees Lose the Benefit of Evidentiary Protections 19

C. Developments Since *Gilmer* Have Demonstrated That Mandatory Arbitration of Statutory Employment Claims Is Inappropriate 20

1. Repeat User Bias 20

2. Surveys Show That Employers Are Far More Successful In Arbitration 21

3. Counsel For Employers Repeatedly Recommend That Employers Use Mandatory Arbitration Because They Will Win More and Pay Less 21

4. Government Agencies, Professional Organizations and Legal Scholars Have Strongly Opposed and Condemned Mandatory Employment Arbitration of Statutory Claims 22

a. The Equal Employment Opportunity Commission 22

b. The National Academy of Arbitrators 23

c. The Dunlop Commission 24

d. The National Labor Relations Board 25

e. Academics and Legal Scholars 25

D. Unilaterally Imposed Arbitration is Inconsistent with the Consensual Underpinnings of Arbitration, and Forces the Courts to Constantly Review the Validity and Fairness of Agreements 26

1. From Both a Legal And a Policy Perspective, "Voluntariness" Is the Key to The Enforceability of Arbitration Agreements 26

2. Arbitration Agreements Drafted and Imposed by Employers Are Subject to Abuse 27

3. Courts Are Constantly Being Required to Determine The Validity of Involuntary Employment Arbitration Agreements 28

CONCLUSION 29

APPENDIX: DESCRIPTION OF *AMICI CURIAE* A1

TABLE OF AUTHORITIES

Cases	PAGE(S)
Aetna Life Ins. v. Lavoie, 475 U.S. 813 (1986)	20
Albermarle Paper v. Moody, 422 U.S. 405 (1975)	23
Alexander v. Gardner-Denver, 415 U.S. 36 (1974)	5, 6, 10, 12, 16
Anaconda v. District Lodge, 693 F.2d 35 (6th Cir. 1982)	14
Carlsbad Municipal Schools v. Harrell, 118 N.M. 470, 882 P.2d 511 (1994)	15
Cheng-Canindin v. Renaissance Hotel, (1996) 50 Cal.App.4th 676	27, 28
Cole v. Burns Intern'l Security, 105 F.3d 1465 (D.C. Cir. 1997)	10, 16, 17, 23
DiRussa v. Dean Witter, 121 F.3d 818 (2d Cir. 1997)	14, 17, 18
EEOC v. Children's Hospital, 719 F.2d 1426 (9th Cir. 1983)	5
EEOC v. Commercial Office Products Co., 486 U.S. 107 (1988)	23
First Options v. Kaplan, 514 U.S. 938, 115 S.Ct. 1920 (1995)	11, 14
Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983 (1972)	27

Gibson v. Berryhill,
411 U.S. 564 (1973) 20

Gilmer v. Interstate/Lane Johnson Corp.,
500 U.S. 20 (1991) 1, 2, 5, 12, 16, 20

Graham v. Scissor-Tail,
(1981) 28 Cal.3d 807, 623 P.2d 165 27

Graham Oil v. ARCO,
43 F.3d 1244 (9th Cir. 1995) 1, 28

Great Western Mortgage Co. v. Peacock,
110 F.3d 222 (3d Cir. 1997) 27

Health Services Management v. Hughes,
975 F.2d 1253 (7th Cir. 1992) 14

Hooters of America v. Phillips,
Case No. 4:96-3360-22
(D.S.C., March 12, 1998) 19, 27, 28

KMC v. Irving Trust,
757 F.2d 752 (6th Cir. 1985) 27

Leasing Service v. Crane,
804 F.2d 828 (4th Cir. 1986) 26, 27

Mastrobuono v. Shearson-Lehman,
514 U.S. 52 (1995) 26

Mitsubishi Motors v. Soler Chrysler-Plymouth,
473 U.S. 614, 105 S.Ct. 3346 (1985) 11

Moncharsh v. Heily & Blase,
3 Cal.4th 1, 832 P.2d 899 (1992) 13

Morrissey v. Brewer,
408 U.S. 471 (1972) 20

Nelson v. Cyprus Bagdad Copper Corp.,
119 F.3d 756 (9th Cir. 1997) 27

Newman v. Piggie Park Enterprises,
390 U.S. 400 (1968) 4

O.R. Securities v. Prof. Planning Assoc.,
857 F.2d 742 (11th Cir. 1988) ....,............... 15

Paladino v. Avnet Computer,
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Prudential v. Lai,
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INTEREST OF THE AMICI CURIAE

This *Amici Curiae* brief is submitted by the National Employment Lawyers Association, the NOW Legal Defense and Education Fund, the Association of Trial Lawyers of America, Disability Rights Education and Defense Fund, Inc., and the National Partnership for Women and Families.[1] The *amici* consist of a range of organizations that either directly represent or whose members directly represent employees in employment discrimination and other civil rights cases, and who share similar concerns that mandatory arbitration deprives plaintiff employees of constitutionally and statutorily guaranteed rights and remedies.

INTRODUCTION & SUMMARY OF ARGUMENT

Over the past 15 years, it has become commonplace for economically powerful parties to impose arbitration on those with whom they deal. Frequently, the motive behind this requirement is transparent: to bypass the constitutional and statutory rights and remedies of the economically weaker party.[2]

Following *Gilmer v. Interstate/Lane Johnson Corp.*, 500 U.S. 20 (1991), employers have made a concerted effort to avoid both the judicial system and the Civil Rights Act of 1991,[3] by requiring employees to submit discrimination claims to arbitration as a condition of employment. Many lower courts—including the U.S. Court of Appeals for the Fourth Circuit in this case—have contributed to this dangerous process by expanding and misapplying *Gilmer* and other arbitration decisions of this Court. These courts have mistakenly proclaimed that there is a "public policy" favoring arbitration over our constitutional jury trial system. This position is not only unsupportable as a matter of constitutional law, it misconstrues the pronouncements of this Court, the purposes underlying the civil rights laws, and the intent of the Federal Arbitration Act.[4]

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part. No persons other than the *Amici Curiae*, their members or their counsel made a monetary contribution to the preparation and submission of this brief. A Description of the *Amici Curiae* is set forth in the Appendix hereto.

[2] See *Graham Oil v. ARCO*, 43 F.3d 1244, 1247-48 (9th Cir. 1995).

[3] Pub.L.No.102-166.

What makes mandatory arbitration particularly insidious in the employment setting is the fact that employer-mandated arbitration is not simply "another forum" for the resolution of statutory employment claims. Mandatory arbitration, unilaterally designed and imposed by employers, has proven itself to be a grossly inferior, ineffective and inappropriate method for employees to enforce their statutory rights.

In the instant case, Respondent Universal Maritime Shipping asks the Court to go far beyond the holding of *Gilmer*, and to rule that an employee subject to a collective bargaining agreement has no right to bring suit in federal court on a federal statutory civil rights claim. Amici urge the Court to reject Respondent's argument and to correct the lower courts' over-extension of *Gilmer*'s narrow holding. Amici ask the Court to clarify three crucial points relating to the arbitration of statutory employment claims.

First, with respect to statutory employment rights, there is no "public policy" favoring employer-mandated arbitration. Rather, public policy favors the right of employees to have access to federal courts and a jury, in order to vindicate their statutory entitlements in the manner expressly provided for by the statute. *Second*, arbitration agreements are only enforceable if they are knowing and *voluntary*. This is consistent with the Federal Arbitration Act, and with the traditional judicial standard applied to a waiver of constitutional and statutory rights. *Third*, when employers require employees to submit to arbitration as a non-negotiable condition of employment, thereby coercing employees into forfeiting their rights, such an agreement is not "voluntary" in any real sense. Therefore, such agreements are invalid and unenforceable.

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[4] 9 U.S.C. § 1 et seq.

LEGAL ARGUMENT

A. Public Policy Does Not "Favor" Arbitration of Statutory Claims

Parties and courts seeking to enforce arbitration clauses routinely state that, "public policy favors arbitration." In fact, this assertion is completely unsupportable, *especially* in the context of unilaterally imposed arbitration of statutory employment rights. Public policy does not "favor" arbitration. To the contrary, public policy mandates preserving the right to a *jury trial*, to due process, and to a citizen's being able to enforce his or her legal rights in a public court before neutral judges who are required to follow the law.

It is often stated that "public policy" should not be created by the courts; it must emanate from the Constitution or statutory provisions. This country's "public policy" concerning its citizens' right of access to an Article III court is easily discerned and indisputable.

1. The Historic and Constitutional Roots of Public Policy

a. The Declaration of Independence

The Declaration of Independence is an appropriate place to start an examination of "public policy" in this context. It lists the grievances against the King that justified the creation of this country. Among the specific reasons stated was, "for depriving us, in many cases, of the benefit of Trial by Jury." The Declaration of Independence (U.S. 1776).

b. Article III of the Constitution

Article III of the United States Constitution created a public civil justice system administered by impartial judges, appointed for life and bound to follow the law of the land.[5] By this scheme, Article III

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[5] U.S. Const. art. III. That section vests the "judicial power of the United States," which extends "to all Cases, in Law and Equity, arising under this Constitution," in the "supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish," whose judges hold (continued...)

"protect[s] the role of the independent judiciary within the constitutional scheme of tripartite government and assure[s] the impartial adjudication in federal courts."[6]

c. The Bill of Rights

The importance attached to the jury trial was next reflected in the United States Constitution's Bill of Rights—perhaps the most compelling statement of "public policy." The Seventh Amendment provides that, "the right of trial by jury shall be *preserved.*" U.S. Const. amend. VII (emphasis added). It is thus the express duty of the courts to protect and *preserve* this right, and not to condone its being coercively taken away by employers.

The Fifth Amendment to the Constitution further guarantees to citizens the right to "due process of law." U.S. Const. amend. V. The Fourteenth Amendment to the Constitution guarantees the right to "equal protection of the laws." U.S. Const. amend. XIV. At a minimum, "due process" and "equal protection" mean the right to have the laws passed for one's protection enforced correctly.

2. The Public Policy Underlying the Civil Rights Laws

a. Title VII

Congress considered the federal anti-discrimination laws[7] to be statements of critical public policy. They were deemed laws of the "highest priority" and of "paramount importance." *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402 (1968).

(...continued)
lifetime appointments and whose compensation cannot be diminished during their terms of office. *Id.*, §§ 1-2.

[6] *Thomas v. Union Carbide*, 473 U.S. 568, 582-83 (1985); see also, R. Fallon, *Of Legislative Courts, Administrative Agencies and Article III*, 101 Harv.L.Rev. 916, 943 (1988) (Article III promotes the "constitutional interest in maintaining a judicial check against arbitrariness [or] infidelity to the requirements of law").

[7] 42 U.S.C. § 2000e et seq.

Title VII of the Civil Rights Act of 1964 was landmark legislation in large part because it intended that employees would have access to the *federal courts* when bringing discrimination claims.[8] Prior to *Gilmer*, the courts consistently construed the language and legislative history of Title VII as precluding *any* binding arbitration of statutory employment claims, *even where the arbitration agreement was both voluntary and knowing.*[9] *Alexander v. Gardner-Denver*, 415 U.S. 36, 47-51 (1974); *Prudential v. Lai*, 42 F.3d 1299, 1303-04 (9th Cir. 1994); *EEOC v. Children's Hospital*, 719 F.2d 1426, 1431 (9th Cir. 1983).

In 1991, after the *Gilmer* decision, Congress passed the Civil Rights Act of 1991 ("C.R.A."), expressly giving employees the right to a *jury trial* when bringing federal discrimination claims.[10] The jury right was given to employees in exchange for a cap on damages.[11] In the C.R.A., Congress encouraged the use of alternative dispute resolution mechanisms, but only where both parties *knowingly and voluntarily* agreed to submit their dispute to the non-judicial forum that the parties deemed "most appropriate" for their particular case.[12] As Representative Edwards explained, "The section contemplates the use of *voluntary* arbitration to resolve specific disputes *after they have arisen*, not coercive attempts to force employees *in advance* to forego statutory rights."[13]

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[8] 42 U.S.C. § 2000e-5(f)(3). As this Court said in *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974), "The purposes and procedures of Title VII indicate that Congress intended federal courts to exercise final responsibility for enforcement of Title VII; deferral to arbitral decisions would be inconsistent with that goal." 415 U.S. at 56.

[9] In *Gilmer*, the Court suggested that under some circumstances, an employee could be bound to arbitrate his or her statutory claims. The Court did not delineate what those circumstances were.

[10] 10 Pub.L.No. 102-166; § 102, § 1977A(c), 105 Stat. 1071, 1073 (1991); 42 U.S.C. § 1981a(c).

[11] 42 U.S.C. § 1981a(b).

[12] Congress encouraged the use, "where appropriate and to the extent authorized by law . . . of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, fact-finding, minitrials, and arbitration." 42 U.S.C. § 1981 notes (West 1994). See *Prudential v. Lai*, *supra*, 42 F.3d at 1304-05 (in light of legislative history of Title VII and the strong public policy of protecting victims of discrimination, court will only permit arbitration of Title VII disputes where it is established that there was a knowing agreement to submit such disputes to arbitration).

Thus, Congress has made it clear that the federal civil rights laws: a) represent a public policy of the highest national priority; b) assure employees of the right to access to the federal courts and a jury trial; and c) mandate that employers cannot compel employees to forfeit these rights prospectively as a condition of employment.

b. The Americans with Disabilities Act

In passing the Americans with Disabilities Act,[14] Congress made sure that there was no confusion about whether employers could require employees to forfeit the statute's protections of access to a court and a jury trial:

> The Committee believes that any agreement to submit disputed issues to arbitration, whether in the context of a collective bargaining agreement or in an employment contract, does not preclude the affected person from seeking relief under the enforcement provisions of this Act. This view is consistent with the Supreme Court's interpretation of title VII of the Civil Rights Act of 1964, whose remedial provisions are incorporated by reference in title I. The Committee believes that the approach articulated by the Supreme Court in Alexander v. Gardner-Denver Co. [415 U.S. 36 (1974)] applies equally to the ADA and does not intend that the inclusion of Section 513 be used to preclude rights and remedies that would otherwise be available to persons with disabilities.

H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 3 at 76-77 (1990).

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[13] 137 Cong. Rec. H9526 (daily ed. Nov. 7, 1991) (statement of Rep. Edwards) (emphasis added). No one in Congress advanced the contrary view, i.e., that the 1991 Act would allow prospective waivers obtained as a condition of employment. In fact, Congress *rejected* a provision that would have allowed the use of mandatory agreements to arbitrate. See H.Rep. No. 102-40(I), 102d Cong., 1st Sess.d (1991), reprinted in 1991 U.S.C.C.A.N. 549, 635.

[14] 42 U.S.C. § 12101 et seq.

The Conference Committee Report also explains that an arbitration agreement does not preclude judicial remedies:

> It is the intent of the conferees that the use of these alternative dispute resolution procedures is completely voluntary. Under no condition could an arbitration clause in a collective bargaining agreement or employment contract prevent an individual from pursuing their rights under the ADA.

H.R. Conf. Rep. No. 596, 101st Cong., 2d Sess. 89 (1990).

It is apparent from the above constitutional and statutory provisions that there is no public policy which "favors" arbitration over the right to a jury trial of statutory civil rights claims. Indeed, allowing the party who is regulated by these laws—the employer—to unilaterally "opt out" of these provisions is completely *inconsistent* with Congress' purpose in passing these statutes.

An accurate statement of public policy would be that public policy under the civil rights laws encourages and permits parties to *voluntarily* select an appropriate alternative dispute resolution mechanism to meet the needs of a particular case, *after* a dispute has arisen. But it is clearly against the policy behind the civil rights laws for employers to coerce employees into forfeiting their statutory rights to federal court judges and juries, by requiring employees to arbitrate any future disputes as a condition of obtaining employment.

3. The Federal Arbitration Act Did Not—And Could Not—Create A Public Policy "Preferring" Arbitration Over Litigation

Some courts and employers seeking to justify a policy "favoring" arbitration in the context of statutory employment laws have pointed to the Federal Arbitration Act, claiming that its passage was meant to indicate a new "preference" for arbitration. Once again, this is completely unsupportable.

First of all, a legislative statute such as the FAA *cannot* create a "public policy" which contradicts the express public policy set forth in the United States Constitution, i.e., a policy favoring the right to a jury trial and access to an Article III court.

Second, the FAA was passed 40 years before the first federal employment discrimination laws were enacted, and 65 years before the 1991 amendments to those laws. Thus, it can hardly be argued that the FAA was ever intended to create a "policy" superseding the provisions of the civil rights laws which ensured victims of discrimination access to federal courts and the right to a jury trial.

Third, the FAA was never intended to create a "preference" for arbitration, much less a "public policy" favoring arbitration. The original intent of the FAA was simply to allow *commercial* entities of *equal bargaining power* the right to use arbitration as a dispute mechanism, at a time when arbitration was held in such low regard that many courts flatly refused to enforce arbitration agreements, even if they were voluntary.[15]

In sum, Congress passed the FAA *not* to give a "preference" to arbitration, but simply to allow courts to *permit* arbitration of contractual matters arising out of a transaction between *commercial entities*[16] when such agreements were *wholly voluntary*. There is a vast difference between removing a "prohibition" on arbitration and creating a "preference" for it.

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[15] J. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 Wash. U. L.Q. 637, 647-52 (1996) (hereafter, "Sternlight, *Panacea*"); D. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 Wisc. L.R. 33, 73-81, 122-23 (1997) (hereafter, "Schwartz, *Enforcing*").

[16] This court did not decide the scope of the FAA's employment contract exclusion in *Gilmer, supra*. Since *Gilmer*, however, several law review articles have detailed the significant legislative history supporting Justice Stevens' interpretation of the exclusion as set forth in his dissent in *Gilmer*. See M. Finkin, *Employment Contracts Under the FAA— Reconsidered*, 1997 Lab.L.J. 329 (June 1997) (hereafter "Finkin, *Employment Contracts*"); M. Finkin, *Workers' Contracts Under the United States Arbitration Act: An Essay In Historical Clarification*, 17 Berkeley J.Emp. & Lab.L. 282 (1996) (hereafter "Finkin, *Workers' Contracts*"); J. Stempel, *Reconsidering the Employment Contract Exclusion in Section 1 of the Federal Arbitration Act: Correcting the Judiciary's Failure of Statutory Vision*, 1991 J.Disp.Resol. 259, 265-6 (1991) (hereafter "Stempel, *Reconsidering*"); Sternlight, *Panacea*, pp. 647-52; Schwartz, *Enforcing*, pp. 73-81, 122-23.

4. Especially Where The Employment Relationship Is One of Unequal Bargaining Power, Public Policy Does Not Favor Permitting Coercive Arbitration Agreements Which Threaten Statutory Protections

Employers who seek to enforce mandatory arbitration agreements claim that they are merely seeking to uphold "freedom of contract." Congress has long determined that an unregulated free market is not always appropriate in the employment relationship.[17] That the FAA would exclude employment contracts from its intended coverage makes perfect sense, since Congress has always recognized that the employment relationship is one of inherently unequal bargaining power.

This country's entire body of labor law was created in response to this inequality in bargaining power between employers and individual employees.[18] During this century, Congress and the state legislatures have created an extensive scheme of statutory protections for workers.[19]

Whenever Congress has imposed some restraint on the way an employer can treat its employees, it has enunciated a public policy reflecting values it considered important. These statutes reflect a strong public policy of protecting employees where they cannot protect themselves, due to the vastly superior bargaining power of employers. In the context of mandatory arbitration agreements, imposed by employers as a condition of employment, this disparity in "bargaining" power is obvious. There is rarely any "bargaining" available to a prospective employee presented with an arbitration agreement; his or her "alternative" is to go without work.[20]

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[17] See, e.g., Title VII, 42 U.S.C. § 2000 *et seq.*, which limits employers' freedom to make employment decisions for discriminatory reasons, and the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, enacted in 1938, which limits employers' ability to pay substandard wages or require excessive hours.

[18] In setting forth the policy reasons underlying the National Labor Relations Act, which gave employees the right to organize and bargain collectively, Congress noted that its passage was necessary because of, "The inequality of bargaining power between employees . . . and employers. . . ." 29 U.S.C. § 151. The NLRA was designed to "restor[e] equality of bargaining power between employers and employees." *Id.*

[19] Congress alone has enacted statutes in the following areas: preventing the abuse of child labor; regulating minimum wages and maximum work hours; conferring on employees the right to organize, and to form and join unions; and prohibiting discrimination of all kinds, whether based on race, gender, age, religion or disability.

Significantly, the National Academy of Arbitrators, the leading professional organization of labor-management arbitrators, which has strongly supported arbitration in the collective bargaining context, has

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[20] This Court has approved of arbitration in the organized labor (union-management) context for several key reasons. First, and most importantly, labor arbitration was agreed to by parties of roughly equal bargaining power. Second, this Court has recognized the unique trade-off inherent in collective bargaining, the finality of arbitration in exchange for labor peace (no strikes). Third, the labor arbitrator is expected to simply interpret and decide *contract* issues, arising out of the collective bargaining agreement itself. *United Steelworkers v. Enterprise Car and Wheel*, 363 U.S. 593 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); Sternlight, *Panacea*, pp. 642-43, 653-54; Schwartz, *Enforcing*, pp. 72-73, n. 130.

But even in the organized labor context, the courts have recognized that limitations must be placed on arbitration agreements, to the extent they implicate statutory claims. *Alexander v. Gardner-Denver, supra.*

Furthermore, courts and commentators alike have recognized the vast difference between arbitration in the organized labor context and in the individual employee context. *Cole v. Burns Intern'l Security*, 105 F.3d 1465, 1476-1477 (D.C. Cir. 1997) (questioning validity of imposing the model of collective bargaining agreement arbitration onto individual employment situations where employees are attempting to enforce public statutory rights, and noting the structural protections for employees inherent in the union/collective bargaining arena); Sternlight, *Panacea*, pp. 642-43 (using labor arbitration in lieu of a union labor strike is entirely different from using individual arbitration in lieu of a public court proceeding); J. Sternlight, Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers and Due Process Concerns, 72 Tulane L.R. 1, 7 (1977) (hereafter "Sternlight, *Rethinking*").

condemned the concept of mandatory pre-dispute arbitration agreements in the individual worker context.[21]

5. This Court Has Recognized That Any "Policy" In Favor of Arbitration Only Exists With Respect to the Scope of Arbitration Agreements Which Have Been Entered Into "Voluntarily"

This Court has recognized that, despite much of the rhetoric concerning a "liberal" federal policy favoring arbitration, this simply means that if two parties have entered into a valid, *consensual* agreement to arbitrate, the courts will thereafter liberally construe the *scope* of that agreement. *Mitsubishi Motors v. Soler Chrysler-Plymouth*, 473 U.S. 614, 625-27, 105 S.Ct. 3346 (1985). And in *First Options v. Kaplan*, 514 U.S. 938, 115 S.Ct. 1920, 1925 (1995), the Court made clear that:

> . . . the basic objective in this area is not to resolve disputes in the quickest manner possible, no matter what the parties' wishes, but to ensure that *commercial* arbitration agreements, like other contracts, are enforced according to their terms, and according to the intentions of the parties.

First Options, supra, 115 S.Ct. at 1925 (emphasis added).

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[21] In 1997, the Academy passed a resolution stating, "The National Academy of Arbitrators opposes mandatory employment arbitration as a condition of employment when it requires waiver of direct access to either a judicial or administrative forum for pursuit of statutory rights." National Academy of Arbitrators Statement and Guidelines (May 21, 1997) 103 Daily Lab. Rep. (BNA) E-1 (May 29, 1997). The Academy position is based largely on the notion that the justification for the enforcement of agreements to arbitrate rests on the premise that such agreements are completely voluntary, and that voluntariness is obviously lacking when employers condition employment on submission to arbitration. See Amicus Curiae Brief of the National Academy of Arbitrators, p. 16, filed in *Duffield v. Robertson Stephens*, Appeal No. 97-15698 (9th Cir., filed August 6, 1997) (hereafter "Academy Amicus Brief in *Duffield*").

B. Mandatory Arbitration Is Not "Just Another Forum" For Resolution of Statutory Claims

In *Gilmer*, this Court upheld an arbitration agreement which required arbitration of a statutory age discrimination claim. The Court's ruling was based on several critical assumptions. First, the Court assumed that, "by agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." 500 U.S. at 26. In other words, the Court assumed—in the absence of proof to the contrary—that arbitration of statutory employment disputes would be "just another forum," essentially equivalent to federal court for purposes of vindicating statutory rights.

The Court's second critical assumption in *Gilmer* was that, "the prospective litigant *effectively may vindicate [his or her] statutory cause of action* in the arbitral forum," such that the specific statute at issue would "continue to serve both its remedial and deterrent function." *Gilmer*, 500 U.S. at 28 (emphasis added).

In the context of employer-mandated arbitration, both of these assumptions have proven simply incorrect. Arbitration is not "just another forum," and employees are often not able to effectively vindicate their statutory rights. Employees *do* lose substantive rights, including the right to have the civil rights laws applied and enforced as written. The result is that the remedial and deterrent functions of the nation's employment laws are being undermined.[22]

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[22] This Court has long recognized that the choice of forum materially affects the substantive rights to be vindicated. *Alexander v. Gardner-Denver, supra*, 415 U.S. at 56. As this Court further explained in *Alexander*, "arbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII." *Id.* at 57.

1. Employees Lose The Substantive Right to Have the Statutory Employment Laws Enforced Correctly, Since Arbitrators Are Not Obligated To Follow Or Apply The Law, And Arbitrators' Decisions Are Virtually Unreviewable

One of the most important substantive rights an employee has is the right to have the civil rights laws applied and enforced as written. It would do little good for employees to have numerous protective statutes enacted by Congress if the courts were then permitted to ignore or misapply those laws.

Yet, employees face precisely this situation in the arbitration context. Since courts are essentially powerless to review or correct arbitrators' decisions, arbitrators are empowered to ignore or misapply statutory law, including the civil rights laws.[23]

a. Arbitrators Are Sometimes Expressly Instructed That They Are Not Obligated To Follow Statutory Law

Arbitrators are sometimes told that they have no obligation to follow statutory law in the first place. For example, in some arbitration settings, arbitrators are specifically instructed that they "are not strictly bound by case precedent or statutory law."[24]

Even if an arbitrator feels obligated to follow the law, he or she may make an error of law. But it is virtually impossible to overturn even the most egregious errors of law, for two reasons. First, the standard of review is exceedingly narrow. Second, arbitrators are not required to set forth any written explanation of their decision, so there is rarely a record or written opinion to review.

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[23] This is hardly surprising. The main goal of arbitration is finality. The goal of arbitration is not, and never has been, to reach the "legally correct result." See *Moncharsh v. Heily & Blase*, 3 Cal.4th 1, 8-12, 832 P.2d 899 (1992) ("by voluntarily submitting to arbitration, the parties have agreed to bear the risk [that the arbitrator will make a mistake] in return for a quick . . . and conclusive resolution to their dispute"); P. Carrington & P. Haagen, *Contract and Jurisdiction*, 1996 Sup.Ct.Rev. 331, 344-45 (1997) (hereafter, "Carrington, *Contract*").

[24] *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith*, 76 FEP 681 (D.Mass. 1998) (quoting the Securities Industry Conference on Arbitration *Arbitrator's Manual* [hereinafter "SICA *Arbitrator's Manual*"], p. 19). Thus, in a discrimination case, NASD arbitrators are essentially being told that they need not follow the civil rights laws as written. See also Carrington, *Contract*, pp. 344-45.

b. The Applicable Standard of Review Makes It Virtually Impossible to Overturn Arbitrators' Errors of Law

With respect to arbitration awards under the FAA, the decision may not be overturned unless the arbitrator "manifestly disregards the law."[25] But this standard is virtually impossible to meet. First, vacating the award cannot be justified merely because an arbitrator made a clear error in interpretation or application of the law. 9 U.S.C. § 10; *Anaconda v. District Lodge*, 693 F.2d 35, 37-38 (6th Cir. 1982). Instead, the party must prove that the arbitrator knew the law, understood it, found it applicable, and specifically chose to ignore it. See *Health Services Management v. Hughes*, 975 F.2d 1253, 1267 (7th Cir. 1992); *Remmey v. PaineWebber*, 32 F.3d 143, 149 (4th Cir. 1994).

This leads to outlandish results such as *DiRussa v. Dean Witter*, 121 F.3d 818 (2d Cir. 1997), in which the arbitrator failed to award attorneys' fees to a prevailing plaintiff in a discrimination case, in plain violation of the statutory requirements. The arbitrator's plainly erroneous decision was affirmed by the courts, which stated that even though the arbitrator was clearly wrong under the law, his decision would not be modified or reversed, since there was no clear proof that the arbitrator had "known" the correct law and had then intentionally "disregarded" it. As long as the arbitrator was simply "ignorant" of the correct law, the arbitration decision would be affirmed.

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[25] *First Options v. Kaplan, supra*, 115 S.Ct. at 1923.

c. Since Arbitrators Often Give No Written Explanation or Opinion For Their Award, Overturning The Award Is Virtually Impossible

For a party wishing to challenge an arbitration award, proving that an arbitrator "knew" the law but then "purposely disregarded" it is a practical impossibility, since arbitrators are rarely required to set forth any explanation for their decision.[26] As one court noted, "When arbitrators do not give their reasons, it is nearly impossible for the court to determine whether they acted in disregard of the law." *O.R. Securities v. Prof. Planning Assoc.*, 857 F.2d 742, 747 (11th Cir. 1988); Carrington, *Contract*, pp. 397-98.

In sum, an arbitrator does not need to follow statutory law, and does not need to issue any written explanation or rationale for his or her award. Thus, it is usually *impossible* for a party to establish that an arbitrator has ever engaged in "manifest disregard." This lack of effective judicial review raises serious due process issues where arbitration has been unilaterally imposed on one party.[27]

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[26] For example, the FAA does not require arbitrators to explain their decisions or even to record the evidence on which they are based, so it is impossible to detect whether a particular award is or is not a faithful application of the controlling law. Carrington, *Contract*, p. 347. Indeed, in the securities industry, arbitrator training manuals *discourage* arbitrators from giving any written analysis, in order to avoid judicial review. *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith*, 76 FEP 681 (D.Mass. 1998) (citing materials used in National Association of Securities Dealers arbitrator training sessions).

[27] This concern was addressed by the New Mexico Supreme Court in a slightly different arbitration context. In *Carlsbad Municipal Schools v. Harrell*, 118 N.M. 470, 882 P.2d 511 (1994), the court held that when a party is forced into compulsory arbitration, the scope of judicial review may not be narrowly limited. To compel a party to arbitrate, but then to deny effective judicial oversight would be a *violation of due process*. At a minimum, if a party is forced into arbitration, the law requires that the courts have the opportunity to see whether the law was correctly applied.

Other commentators have suggested that where employees have been compelled to submit to arbitration, and have not "voluntarily" waived the right to adequate judicial review of the arbitration decision, the employee's due process rights may have been violated. Sternlight, *Rethinking*, pp. 95-97.

The problems of limited judicial review become even more acute when arbitrators are not only allowed to ignore statutory law, but when the arbitrators have no expertise in employment or civil rights law. As pointed out in *Alexander v. Gardner-Denver*, 415 U.S. 36, 57 (1974), arbitrators typically know the "law of the shop," not the civil rights laws.[28]

In *Gilmer*, the Court "assumed" that there would be "sufficient" judicial review of the arbitration decision "to ensure that arbitrators complied with the requirements of the statute." See *Gilmer*, 500 U.S. at 32, n. 4. In the real world, this assumption has proven to be groundless, as few arbitration decisions provide enough information to make such a review possible. This is yet another reason why mandatory arbitration of statutory employment claims cannot be justified.

2. The Costs To An Employee To Vindicate His or Her Rights Are Exorbitant

An employee does not have to pay a federal court judge to hear his or her discrimination claim; access to the public courts is free, once the initial $150 filing fee is paid. By contrast, employees who are required to submit to arbitration face exorbitant "forum" costs.

Parties to arbitration are routinely charged an initial filing fee of several thousand dollars. Schwartz, *Enforcing*, p. 44, n. 30. They are then often charged two or three thousand dollars *per day* in arbitration "forum fees," since arbitrators typically charge $300-400 per hour for their services.[29] Schwartz, *Enforcing*, p. 44, n. 30. Over the course of an arbitration, a plaintiff may ultimately be required to pay tens of thousands of dollars in arbitration "forum fees"—*even when they have prevailed.*[30]

The outlandish costs and fees imposed on those compelled to arbitrate may act as a significant barrier to employees, and may deter employees from exercising their statutory rights. Several circuits have recently found that the imposition of such fees on plaintiffs renders such an arbitration agreement unenforceable. *Cole v. Burns*, *supra*, 105 F.3d at 1483;[31] *Paladino v. Avnet Computer*, 134 F.3d 1054 (11th Cir. 1998).

Prevailing plaintiffs who are required to pay these "forum fees" frequently suffer the additional economic burden that arbitrators may misapply or ignore statutory law, and may fail to award prevailing plaintiffs their costs or attorneys fees.[32] See *DiRussa v. Dean Witter*, *supra* (arbitrator failed to award prevailing plaintiff in discrimination case costs and attorneys fees, even though such an award was required under the civil rights laws; court powerless to correct this error).

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[28] Following a lengthy survey, the federal government's General Accounting Office expressed serious reservations about the competence of securities industry arbitrators to hear employment cases. See GAO Report HEHS-94-17, *Employment Discrimination: How Registered Representatives Fare in Discrimination Disputes* (March 30, 1994) (finding that securities industry arbitrators are inadequately trained to handle discrimination cases); see also, *Cole v. Burns*, *supra*, 105 F.3d at 1477 (questioning competence of arbitrators to analyze and decide purely legal issues in connection with statutory claims).

[29] This assumes that there is only one arbitrator. Often, there is a panel of arbitrators, and the forum fees will naturally rise. In *Cole v. Burns*, *supra*, the court noted that JAMS/Endispute arbitrators charge an average of $400 per hour, although fees of $500 or $600 per hour are not uncommon. 105 F.3d at 1480, n. 8.

[30] For example, in a ten day arbitration, even if there is just one arbitrator who charges $350 per hour, the cost to the parties (based on an eight hour day) would be $28,000 in arbitration fees, plus the initial filing fee of several thousand dollars. Thus, a plaintiff employee might have to pay $15,000 in "forum fees," just to vindicate his or her statutory rights.

[31] In *Cole*, the Court stated that, "In our view, an employee can never be required, as a condition of employment, to pay an arbitrator's compensation in order to secure resolution of statutory claims under Title VII (any more than an employee can be made to pay a judge's salary). If there is any risk that an arbitration agreement can be construed to require this result, this would surely deter the bringing of arbitration and constitute a de facto forfeiture of the employee's statutory rights." 105 F.3d at 1468.

[32] Congress encouraged victims of discrimination to vindicate their statutory rights under Title VII by shifting a prevailing plaintiff's reasonable attorneys fees and costs to the losing party. 42 U.S.C. § 2000e-5(k). The failure of arbitrators to award fees and costs to a prevailing plaintiff undermines one of the critical features of the civil rights laws.

3. In Arbitration, Significantly Limited Discovery Unfairly Burdens Employees Attempting to Vindicate Statutory Rights

Arbitration works best when it involves parties of equal bargaining power who have equal access to the evidence. However, a plaintiff in a discrimination case is at a severe disadvantage in an arbitration setting. An employee generally needs extensive discovery if she is going to establish her claims. The plaintiff not only has the burden of proof, but the plaintiff in many employment cases (including discrimination cases) must prove "state of mind," or show "pretext" by the employer, or show a "pattern" of discrimination or conduct. Without full and complete discovery, an employee/plaintiff is greatly handicapped in attempting to prove her claims.

In litigation, such discovery is easily accessible through the Federal (or state) Rules of Civil Procedure. However, arbitration permits very little, if any, discovery. Whatever limited discovery may be allowed is left to the discretion of the arbitrator. Schwartz, *Enforcing*, pp. 46-47. Significantly, the severe limitations on discovery in arbitration heavily favor the *employer* in any employee/employer dispute, since *the employer usually controls almost all of the critical evidence in a case.*

An employee typically needs to obtain documents from the employer, gather statistical evidence from the employer and, perhaps most importantly, take depositions of the employer's employees.[33] The employer not only possesses most of the written evidence relevant to the case, but the employer has full access to the various employees and managers who may be witnesses. This poses a major problem for employee/plaintiffs, because the plaintiff's attorney is ethically precluded from even contacting these employees. See Schwartz, *Enforcing*, pp. 46-47, 61; Model Code of Professional

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[33] Other employees are usually the most critical witnesses in an employment case.

Responsibility DR 7-104(A) (1989); Model Rules of Professional Conduct Rule 4.2 (1995). Thus, the *only* method of obtaining information from these employee witnesses is by taking depositions. Yet depositions are often either prohibited or extremely limited in arbitration.[34]

4. Employees Lose the Benefit of Evidentiary Protections

A further obstacle to employees in arbitration is the fact that arbitrators are not required to follow the rules of evidence. This means that employees may lose the benefit of significant evidentiary protections. Schwartz, *Enforcing*, pp. 49-50. For example, in sexual harassment cases, consensual sexual activity of the plaintiff with persons other than the harasser are generally deemed irrelevant and invade the plaintiff's right to privacy. Such evidence is thus specifically excluded in many jurisdictions. See Schwartz, *Enforcing*, p. 49, n. 44; Federal Rule of Evidence 412. Yet arbitrators are not obligated to comply with such evidentiary restrictions, and so procedural protections may be lost.[35]

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[34] In arbitration, there is a presumption against taking depositions, and permission to take depositions is usually only granted in order to preserve testimony of key witnesses who will be unable to testify in person at the arbitration hearing. Schwartz, *Enforcing*, p. 46, n. 34. In addition, employers who draft a mandatory arbitration agreement will sometimes place specific, severe restrictions on the amount of discovery permitted in any arbitration proceeding, by barring depositions altogether or by severely limiting their number. See, e.g., *Hooters of America v. Phillips*, Case No. 4:96-3360-22 (D.S.C., March 12, 1998).

[35] See *Prudential v. Lai*, 42 F.3d 1299, 1305 (9th Cir. 1994) (in a sex harassment case, the remedies and procedural protections available in arbitral forum may differ significantly from those contemplated by the legislature, to the detriment of the employee).

C. Developments Since *Gilmer* Have Demonstrated That Mandatory Arbitration of Statutory Employment Claims Is Inappropriate

In *Gilmer*, the Court stated that it would not accept "generalized attacks" and "speculat[ion]" about the suspected shortcomings of arbitration, especially since the plaintiff in *Gilmer* had made no specific showing of actual problems with the process. 500 U.S. at 30. However, since *Gilmer* was decided, there have been numerous studies, surveys, and articles dealing with how mandatory arbitration of statutory employment claims has worked in the "real world." In sum, it has now been empirically demonstrated that mandatory arbitration places the employee at a *severe disadvantage*, and that outcomes in arbitration are far more favorable to employers than employees when compared to similar cases brought in a public court.

1. Repeat User Bias

This Court has repeatedly held that constitutional due process entitles parties to unbiased decision-makers.[36] Since arbitrators rely on repeat business for income, many commentators have expressed a serious concern about the potential for an arbitrator's bias in favor of "repeat users," i.e., a natural tendency to favor the party which has the potential of using the arbitrator's services again.[37]

In the employment setting, the "repeat users" are the employers. Thus, there was always the perception that arbitrators will favor the employer's side. Significantly, there is now an empirical study showing that this "repeat user" bias exists *in fact* in employment arbitration. Lisa Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 Emply.Rts.& Empl.Policy Journal 1 (1997) (employees recover a lower proportion of their claims in repeat player cases

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[36] *Aetna Life Ins. v. Lavoie*, 475 U.S. 813, 824 (1986); *Morrissey v. Brewer*, 408 U.S. 471, 485-86 (1972); *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973).

[37] See, e.g., Sternlight, *Panacea*, pp. 684-85; Schwartz, *Enforcing*, pp. 60-61 (individual arbitrators have an economic stake in being selected again, and their judgment may well be shaded by a desire to build a "track record" of decisions that corporate repeat users will view approvingly).

than in non-repeat player cases). The significance of this survey is enormous, since it confirms the reality of the "repeat user" bias in employment arbitration.

2. Surveys Show That Employers Are Far More Successful In Arbitration

Several studies and surveys since *Gilmer* have shown that employers fare much better under mandatory arbitration programs than they do in court before a jury. Employers not only win more often in arbitration, but employees who do prevail are awarded far less in damages.[38]

This is consistent with studies indicating that, when a petition to compel arbitration is filed, it is always the *employer* which is seeking to compel arbitration, while the employee is inevitably attempting to bring his or her claims in federal or state court. Schwartz, *Enforcing*, p. 62, n. 88. As an intuitive matter, employers would not be uniformly seeking an arbitration forum unless they felt it gave them an advantage over employees.

3. Counsel For Employers Repeatedly Recommend That Employers Use Mandatory Arbitration Because They Will Win More and Pay Less

Attorneys who counsel employers repeatedly and publicly urge employers to impose mandatory arbitration. These attorneys boldly proclaim that employers who require arbitration are more likely to prevail; are likely to pay less in damage awards; are far more likely to avoid an assessment of punitive damages; and may succeed in discouraging the employee from instituting or pursuing his or her claims, due to the costs and other obstacles imposed by arbitration.[39]

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[38] See Bompey & Pappas, *Is There A Better Way? Compulsory Arbitration of Employment Discrimination Claims After Gilmer*, 19 Emp.Rel.L.J. 197 (1994); R. Alleyne, *Statutory Discrimination Claims: Rights "Waived" and Lost in the Arbitration Forum*, 13 Hofstra Labor L.J. 381 (1996); Schwartz, *Enforcing*, pp. 64-66.

4. Government Agencies, Professional Organizations and Legal Scholars Have Strongly Opposed and Condemned Mandatory Employment Arbitration of Statutory Claims

Since *Gilmer*, various government agencies, commissions, commentators and professional organizations have strongly opposed mandatory employment arbitration of statutory claims.

a. The Equal Employment Opportunity Commission

The Equal Employment Opportunity Commission, the agency charged with enforcing the civil rights laws, has issued an extensive policy statement dealing with mandatory arbitration. The EEOC stated that "agreements that mandate binding arbitration of discrimination claims as a condition of employment are contrary to the fundamental principles evinced in the federal anti-discrimination statutes," and are thus illegal and unenforceable.[40] EEOC, Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment, 133 Daily

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[39] See Schwartz, *Enforcing*, p. 63; Bompey & Pappas, *Is There A Better Way? Compulsory Arbitration of Employment Discrimination Claims After Gilmer*, 19 Emp.Rel.L.J. 197 (1994); see also, BNA Employment Discrimination Report, 1996, Vol. 6, p. 875 (summarizing comments of Paul Cane, a management employment law attorney, made at a conference sponsored by the Labor and Employment Law Section of the State Bar of California, recommending that employers use arbitration agreements because the employer has a better chance of winning in arbitration, damage awards tend to be lower, an arbitrator is less likely to award punitive damages or significant emotional distress damages, the employer can avoid discovery and depositions, and employees may be discouraged from bringing cases forward in the first place if they are faced with arbitration.)

[40] Perhaps recognizing the questionable nature of its compulsory arbitration process, the National Association of Securities Dealers voted in August 1997 to abolish mandatory arbitration of statutory employment discrimination claims. This proposed rule change has not yet been adopted by the Securities and Exchange Commission.

Lab.Rep. (BNA) E-4 (July 11, 1997) (hereafter, "EEOC, *Policy Statement*"). The courts traditionally give "great deference" to the EEOC's views of the proper procedure for vindicating Title VII rights. *EEOC v. Commercial Office Products Co.*, 486 U.S. 107, 115 (1988); *Albermarle Paper v. Moody*, 422 U.S. 405, 431 (1975).

Among the EEOC's objections are that arbitration is not governed by the statutory requirements and standards of Title VII; it is conducted by arbitrators given no training and possessing no expertise in employment law; it routinely does not permit plaintiffs to receive punitive damages and attorneys fees to which they would otherwise be entitled under the statute; and it forces employees to pay exorbitant "forum fees" in the tens of thousands of dollars, greatly discouraging aggrieved employees from seeking relief.[41]

b. The National Academy of Arbitrators

The National Academy of Arbitrators, the leading organization of professional labor-management arbitrators and the body which gave labor arbitration its credibility, has also condemned mandatory arbitration of employment disputes. In 1997, the Academy stated that it "opposes mandatory employment arbitration as a condition of employment when it requires waiver of direct access to either a judicial or administrative forum for the pursuit of statutory rights."[42]

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[41] See EEOC, *Policy Statement*; Amicus Curiae Brief filed by EEOC in *Duffield v. Robertson Stephens*, No. C-95-0109-EFL (N.D.Cal. filed August 4, 1995); *Cole v. Burns*, *supra*, 105 F.3d at 1479 (discussing EEOC's position in numerous amicus curiae briefs filed around the country); *Rosenberg v. Merrill Lynch*, 76 FEP 681 (D.Mass. 1998) (noting EEOC's position as stated in the EEOC's own official policy statements and in brief submitted to the court).

[42] Recently, the Society of Professionals in Dispute Resolution ("SPIDR"), one of this country's leading organizations of neutrals, announced that it, too, was opposing mandatory employment arbitration. In a January 1998 policy statement issued by the SPIDR Board of Directors, the organization stated that it, "is in substantial agreement with the position taken by the National Academy of Arbitrators in opposition to agreements imposing arbitration of statutory rights as a condition of employment." Statement on Arbitration of

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National Academy of Arbitrators Statement and Guidelines, 103 Daily Lab.Rep. (BNA) E-1 (May 29, 1997).

The Academy has expressed strong concern that mandatory arbitration often results in arbitral forums which do not provide elements of fundamental fairness to employees, and in which arbitrators are often not able or willing to enforce the claimed statutory rights. See Amicus Curiae Brief of the National Academy of Arbitrators, filed in *Duffield v. Robertson Stephens*, Appeal No. 97-15698 (9th Cir., filed August 6, 1997) (hereafter "Academy Amicus Brief in *Duffield*").

The Academy was particularly disturbed by the fact that mandatory arbitration, imposed by employers as a condition of employment, was simply not "voluntary."[43]

c. The Dunlop Commission

The requirement of voluntariness is also supported by the recommendations of the "Commission on the Future of Worker-Management Relations" (the "Dunlop Commission"), a blue ribbon Presidential commission. In its December 1994 "Report and Recommendations," the Dunlop Commission stated that, "binding arbitration agreements should not be enforceable as a condition of employment." Commission on the Future of Worker-Management Relations: Report and Recommendations (December 1994), pp. 34-35.

The Dunlop Commission expressed a concern about

> the potential for abuse of ADR created by the imbalance of power between employer and employee, and the resulting unfairness to employees who, voluntarily or otherwise, submit their disputes to ADR. These concerns are obvious if the process is controlled unilaterally by employers, such as when employees are required to sign mandatory arbitration clauses as a condition of employment.

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Statutory Rights Imposed as a Condition of Employment, Approved by SPIDR Board of Directors, January 24, 1998.

[43] See discussion in Section D.1, *infra*.

Commission on the Future of Worker-Management Relations: Report and Recommendations (December 1994), pp. 28-29.

d. The National Labor Relations Board

The National Labor Relations Board has also challenged mandatory employment arbitration agreements as being illegal. In a 1996 report, the General Counsel of the NLRB concluded that mandatory binding arbitration clauses, imposed as a condition of employment, violated the National Labor Relations Act. NLRB General Counsel Report, 1996 Daily Lab.Rep. 36 E-4, E-6,7 (Feb. 23, 1996).

e. Academics and Legal Scholars

Since *Gilmer*, some of the country's most prominent employment law professors and legal scholars have written law review articles in which they conclude that mandatory arbitration of statutory employment claims—imposed by employers as a condition of employment—is unlawful.[44] The reasons include the absence of a "voluntary" waiver of rights, a lack of constitutional due process in the arbitration system, the basic conflict with the purposes and language of the civil rights laws, and the fact that the FAA simply does not apply to employment contracts.

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[44] See, e.g., J. Grodin, *Arbitration of Employment Discrimination Claims: Doctrine and Policy In Wake of Gilmer*, 14 Hofstra Lab.L.J. 1 (1996); P. Carrington & P. Haagen, *Contract and Jurisdiction*, 1996 Sup.Ct.Rev. 331 (1997); R. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 Calif.L.Rev. 3 (1997) ("*Public Justice*"); R. Alleyne, *Statutory Discrimination Claims: Rights "Waived" and Lost in the Arbitration Forum*, 13 Hofstra.Lab.L.J. 381 (1996); J. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 Wash.U.L.Q. 637 (1996); S. Hoffman, *Mandatory Arbitration: Alternative Dispute Resolution or Coercive Dispute Suppression?*, 17 Berk.J.Empl.&Lab.L. 131 (1996); D. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 Wisconsin L.R. 33 (1997).

D. Unilaterally Imposed Arbitration Is Inconsistent with the Consensual Underpinnings of Arbitration, and Forces the Courts to Constantly Review the Validity and Fairness of Agreements

1. From Both a Legal And a Policy Perspective, "Voluntariness" Is the Key to the Enforceability of Arbitration Agreements

Arbitration is only viable, from either a legal or policy perspective, if it is the result of a truly voluntary agreement by the parties, who are aware of arbitration's strengths and limitations, and who have freely decided to use that process to settle a particular dispute. Without this element of a knowing, voluntary agreement, there is no legal or moral justification for enforcing an arbitration agreement.

The National Academy of Arbitrators has stressed that

> . . . the strength and justification for the enforcement of agreements to arbitrate, and for the limited judicial review of arbitration awards, rests on the foundation that agreements to arbitrate be voluntary . . . unless a party has agreed to arbitrate, it will not be compelled to do so. Likewise, the immunity from judicial review of an arbitrator's alleged error of law or fact is premised on the voluntary choice of the parties to submit to an arbitrator's judgment. Without the voluntariness of the arbitration agreement, the public policy favorable to arbitration lacks a foundation.

Academy Amicus Brief in *Duffield*, p. 16.

This emphasis on "voluntariness" is consistent with this Court's own pronouncement that arbitration under the FAA is "a matter of consent, not coercion." *Mastrobuono v. Shearson-Lehman, supra*, 115 S.Ct. at 1216. And, it is consistent with the strict standard traditionally required by the courts before finding a valid waiver of constitutional and statutory rights, i.e., a *knowing* and *voluntary* waiver.[45] An agreement to arbitrate in the employment setting is a

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[45] *Leasing Service v. Crane*, 804 F.2d 828, 832-33 (4th Cir. 1986) (constitutional right to jury trial is fundamental; any purported waiver of that right

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waiver of both constitutional rights (jury trial, Article III court, due process) and statutory rights under the civil rights laws.

2. Arbitration Agreements Drafted and Imposed by Employers Are Subject to Abuse

Our system of justice is an adversarial one. The ability of employers to draft arbitration agreements and then impose them on prospective (or existing) employees as a non-negotiable condition of employment invites abuses by those who control the process. Inevitably, employers have taken advantage of this power, by drafting arbitration agreements which slant the process distinctly in their favor.[46]

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must be both knowing and voluntary; party claiming waiver has burden of showing that consent to the waiver was voluntary and knowing); *KMC v. Irving Trust*, 757 F.2d 752, 756 (6th Cir. 1985) (constitutional right to jury trial may be contractually waived only if done knowingly, intentionally and voluntarily); *Prudential v. Lai, supra* (requiring knowing waiver of statutory rights, remedies and procedural protections under Title VII); *Nelson v. Cyprus Bagdad Copper Corp.*, 119 F.3d 756 (9th Cir. 1997) (requiring "knowing and voluntary" waiver of statutory rights under the civil rights laws); cf. *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983 (1972) (consumer did not waive constitutional due process rights to notice and a hearing when she signed an adhesion contract permitting seller to seize property she had purchased upon non-payment of monthly installment obligations; court noted absence of true "voluntariness" and lack of economic power of consumer).

[46] Thus, mandatory arbitration agreements in recent years have contained the following elements which put the weaker party at a severe disadvantage: (1) a limitation on the remedies an employee may recover, i.e., no tort damages, or no punitive damages (*Paladino v. Avnet Computer, supra*; *Stirlen v. Supercuts* (1997) 51 Cal.App.4th 1519; *Great Western Mortgage Co. v. Peacock*, 110 F.3d 222 (3d Cir. 1997); *Hooters of America v. Phillips*, Case No. 4:96-3360-22 (D.S.C., March 12, 1998)); (2) limitations on the discovery available prior to the arbitration (which inevitably works to the disadvantage of the plaintiff), *Hooters of America v. Phillips, supra*; (3) controlling the panel of arbitrators (*Rosenberg v. Merrill Lynch, supra*; *Cheng-Canindin v. Renaissance Hotel* (1996) 50 Cal.App.4th 676; *Hooters of America v. Phillips, supra*; *Graham v. Scissor-Tail* (1981) 28 Cal.3d 807, 623 P.2d 165); (4) requiring arbitration in some distant location (*Patterson v. ITT Consumer*

(continued...)

3. Courts Are Constantly Being Required to Determine The Validity of Involuntary Employment Arbitration Agreements

In the wake of *Gilmer*, employers have been quick to impose adhesion arbitration clauses on prospective (and existing) employees. As discussed above, the legality and enforceability of such agreements is highly questionable, both from a legal and a policy standpoint.

The courts' dockets are now filled with cases in which employees challenge these coercive arbitration agreements as invalid and unenforceable. The courts are then forced to evaluate both the substance of an arbitration agreement (fundamental fairness of the procedures, due process, unconscionability, etc.), and the circumstances surrounding the creation of the agreement (to determine whether the agreement was "knowing," "voluntary," the product of undue duress or coercion, etc.). Unfortunately, as long as employers continue to require arbitration as a pre-dispute condition of employment, these challenges will continue, and the courts will remain busy evaluating the validity of every such agreement.

The solution to this problem is simple, and follows logically from the concept of "voluntariness." If an arbitration agreement has been required by an employer as a condition of employment, then it is not "voluntary," and any such agreement should be unenforceable. The parties are always free, *after* a dispute has arisen, to voluntarily decide that arbitration is the best method of resolving their particular dispute.

The parties themselves will then be empowered to ensure fairness, by identifying neutral arbitrators and selecting fair procedures. If they have knowingly and voluntarily agreed to use arbitration under these circumstances, then neither party will be going to court to "challenge" the agreement and the courts will be relieved of a substantial burden.

CONCLUSION

Parties certainly have the right to waive constitutional rights. But those rights cannot be taken away by employers with excessive market leverage. The courts need to respect their very reason for being: to protect the constitutional rights of the citizenry and to properly interpret and enforce the laws of Congress. If the courts ensure that fundamental rights may only be waived knowingly and voluntarily, and if they place responsibility for ensuring fairness on the parties, then—and only then—will alternative dispute resolution fulfill its promise.

Amici ask the Court to reverse the decision of the Fourth Circuit, and so uphold the right of an employee to have access to a federal court judge and jury in order to vindicate his or her statutory employment rights.

Respectfully submitted,

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Financial (1993) 14 Cal.App.4th 1659, 18 C.R.2d 563); (5) unilateral agreements, which require the employee to arbitrate, but which permit the employer to go to court (*Stirlen v. Supercuts, supra*); (6) shortening the statute of limitations (*Graham Oil v. ARCO, supra*; *Stirlen v. Supercuts, supra*); (7) ensuring that the employer dominates and controls the arbitration process, such as having the power to control what discovery is permitted or who can testify (*Cheng-Canindin v. Renaissance Hotel, supra*; *Rosenberg v. Merrill Lynch, supra*); and (8) forbidding the arbitrator from awarding attorneys fees or costs, regardless of whether statutes provide such remedies to prevailing plaintiffs (*Stirlen v. Supercuts, supra*; *Paladino v. Avnet Computer, supra*; *Hooters of America v. Phillips, supra*; *Graham Oil v. ARCO, supra*).

APPENDIX

DESCRIPTION OF AMICI CURIAE

The NATIONAL EMPLOYMENT LAWYERS ASSOCIATION ("NELA") is a national bar association with over 3,000 member lawyers in all fifty states, the District of Columbia, Puerto Rico and the Virgin Islands. NELA was founded in 1985. Its members include most of the leading employment lawyers who practice law primarily on behalf of employees. NELA members have represented, and continue to represent, tens of thousands of victims of employment discrimination, in federal and state courts. NELA members' clients will be significantly harmed, as will the public, if employers who violate the nation's civil rights laws are permitted to require—as a condition of employment—that employees submit to arbitration.

For an employee, compulsory arbitration means forfeiting numerous constitutional and statutory rights. Empirical and statistical evidence, as well as the experience of NELA members over the last 10 years, confirms that mandatory arbitration is not "just another forum" for the vindication of statutory employment rights. To the contrary, mandatory arbitration puts employees at a severe disadvantage, and transforms their statutory entitlements into a matter of arbitral discretion.

NELA fully supports and encourages the use of all forms of alternative dispute resolution (including arbitration), *provided* that the parties to a dispute *knowingly and voluntarily* agree that the mechanism chosen is the best method for resolving their dispute. However, employees who are *required* to submit to arbitration as a condition of obtaining or keeping employment have not entered into a "voluntary" agreement to arbitrate. Rather, their submission is a product of employer coercion. Under these circumstances, there is neither a legal nor a policy justification for enforcing such agreements.

The ASSOCIATION OF TRIAL LAWYERS OF AMERICA ("ATLA") is a voluntary national bar association whose approximately 50,000 members from around the country primarily represent personal injury plaintiffs and plaintiffs seeking to vindicate rights under federal statutes, including the Americans with Disabilities Act and the civil rights acts.

ATLA and its members are primarily concerned that access to justice be preserved for workers who may be subjected to various forms of employment discrimination. In ATLA's view, alternative dispute resolution on a truly voluntary basis may offer advantages to both employers and employees. However, employers have used mandatory arbitration to dilute and undermine those rights that Congress specifically put in place to protect workers from overreaching employers. ATLA regards the notion that employer-designed mandatory arbitration should take precedence over the right to trial by jury, expressly guaranteed in the Constitution of the United States and nearly every state constitution, as deeply disturbing.

For these reasons, the issues presented in this case are of great concern to ATLA and its members. At the same time, it is ATLA's view that its long experience defending the rights of access to justice and trial by jury will assist this Court in addressing these issues.

The NOW LEGAL DEFENSE AND EDUCATION FUND ("NOW LDEF") is a leading national non-profit civil rights organization that performs a broad range of legal and educational service in support of women's efforts to eliminate sex-based discrimination and secure equal rights. NOW LDEF was founded in 1970 by leaders of the National Organization for Women. A major goal of NOW LDEF is the elimination of barriers that deny women economic opportunities, including mandatory arbitration of employment discrimination claims under Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act.

The DISABILITY RIGHTS EDUCATION AND DEFENSE FUND, INC. ("DREDF") is a national law and policy center dedicated to protecting and advancing the civil rights of people with disabilities, and securing equal citizenship for all people with disabilities. Founded in 1979, DREDF pursues its mission through education, advocacy and law reform work. In its efforts to promote the full integration of persons with disabilities into the American mainstream, DREDF provides legal representation to people with disabilities in both individual and class action cases on a broad range of issues, including employment-related issues. Nationally recognized for its expertise in the interpretation of disability civil rights laws, since its founding DREDF has also been involved in most disability rights cases heard by the U.S. Supreme Court, and in the legislative process leading to the enactment of the Americans With Disabilities Act.

Founded in 1971, the NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES ("NPWF"), formerly known as the Women's Legal Defense Fund, is a national advocacy organization that develops and promotes public policies to help women achieve equal opportunity, quality health care, and economic security for themselves and their families. NPWF has placed special emphasis on equal employment opportunity by challenging sex-based discrimination in the courts, and by leading efforts to promote and enact employment policies such as the 1993 Family and Medical Leave Act, the Civil Rights Act of 1991, and the 1978 Pregnancy Discrimination Act.

(6)

No. 97-889

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

CEASAR WRIGHT,

Petitioner,

v.

UNIVERSAL MARITIME SERVICE CORP.; STEVENS SHIPPING & TERMINAL COMPANY; STEVEDORING SERVICES OF AMERICA; RYAN-WALSH INC.; STRACHAN SHIPPING COMPANY; CERES MARINE TERMINALS, INC.; and SOUTH CAROLINA STEVEDORES ASSOCIATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF *AMICI CURIAE* OF LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AND AMERICAN ASSOCIATION OF RETIRED PERSONS IN SUPPORT OF PETITIONER CEASAR WRIGHT

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TABLE OF CONTENTS

INTEREST OF *AMICI CURIAE* 1
SUMMARY OF ARGUMENT 2
ARGUMENT 3
I. THE LABOR MANAGEMENT RELATIONS ACT, RATHER THAN THE FEDERAL ARBITRATION ACT, GOVERNS THIS CASE 3
II. *ALEXANDER v. GARDNER-DENVER CO.* WAS CORRECTLY DECIDED AND SHOULD BE REAFFIRMED 7
III. THE LARGER CONTEXT OF THIS CASE DEMONSTRATES THE NEED FOR FURTHER GUIDANCE ON THE ARBITRATION OF CIVIL RIGHTS CLAIMS 9
  A. Agreements to Arbitrate Should Be Knowing and Voluntary 12
  B. Arbitration Agreements Should Not Impose Potentially Onerous Costs on The Claimant 16
  C. Arbitration Procedures Must Provide Remedies And Safeguards Coextensive With Those Available in a Judicial Forum 17
  D. Arbitration Must Provide Fair and Accountable Procedures 20
  E. Arbitration Awards Must Be Subject to Meaningful Judicial Review 22
CONCLUSION 25

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Aetna Insurance Co. v. Kennedy,
301 U.S. 389 (1937) 14
Albemarle Paper Co. v. Moody,
422 U.S. 405 (1975) 17
Alcaraz v. Avnet, Inc.,
933 F. Supp. 1025 (D.N.M. 1996) 18
Alexander v. Gardner-Denver Co.,
415 U.S. 36 (1974) 2,6,8,9,11,15,22
American Postal Workers Union v. United States Postal Service, 861 F.2d 211 (9th Cir. 1988) 4
Asplundh Tree Experts Co. v. Bates,
71 F.3d 592 (6th Cir. 1995) 5
Austin v. OwensBrockway Glass Container, Inc.,
78 F.3d 875 (4th Cir.), *cert. denied*,
117 S. Ct. 432 (1996) 5,7,9
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450 U.S. 728 (1981) 6,8,19,23
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973 F. Supp. 861 (D. Minn. 1997) 13
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918 F. Supp. 1091 (E.D. Mich. 1996) 13
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No. 97 CIV. 4807(RWS), 1998 WL 50210
(S.D.N.Y. Feb. 6, 1998) 13
Brisentine v. Stone & Webster Engineering Corp.,
117 F.3d 519 (11th Cir. 1997) 7
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468 U.S. 42 (1984) 19
Chisolm v. Kidder, Peabody Asset Mgt., Inc.,
966 F. Supp. 218 (S.D.N.Y. 1997) 24
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105 F.3d 1465 (D.C. Cir. 1997) 5,16,17,24,25

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449 U.S. 590 (1981) 22
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514 U.S. 938 (1995) 24
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424 U.S. 747 (1976) 8,20
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Gilmer v. Interstate / Johnson Lane Corp.,
500 U.S. 20 (1991) 1,3,4,9,15,17,20,22,23
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482 U.S. 656 (1987) 8

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137 F.3d 588 (8th Cir. 1998); 24
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67 FEP Cases (BNA) 189 (N.D. Tex. 1994) 18
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No. 972320-D/A, 1997 WL 581439
(W.D. Tenn. July 23, 1997) 13
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512 U.S. 107 (1994) 8,15
Maryland Casualty Co. v. Realty Advisory Board,
107 F.3d 979 (2d Cir. 1997) 5
Mastrobuono v. Shearson Lehman Hutton, Inc.,
514 U.S. 52 (1995) 6
Maye v. Smith Barney, Inc.,
897 F. Supp. 100 (S.D.N.Y. 1995) 13
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466 U.S. 284 (1984) 9,23
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989 F.2d 817 (5th Cir. 1993) 24
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460 U.S. 693 (1983) 6

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Aug 21, 1997) 13
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853 F.2d 1310 (6th Cir. 1988) 5
Paladino v. Avnet Computer Technologies, Inc.,
134 F.3d 1054 (11th Cir. 1998) 5,17
Patterson v. Tenet Healthcare, Inc.,
113 F.3d 832 (8th Cir. 1997) 5,13
Penny v. United Parcel Service,
128 F.3d 408 (6th Cir. 1997) 7
Posadas de Puerto Rico v. Association de Empleados,
873 F.2d 479 (1st Cir. 1989) 5
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Pryner v. Tractor Supply Co.,
109 F.3d 354 (7th Cir.), *cert. denied*,
118 S. Ct. 295 (1997) 5,7,8,14,15,18
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87 F.3d 745 (5th Cir. 1996) 5
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(D. Mass. 1998) 10,15,21,22
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386 U.S. 171 (1967) 8
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(No. 97–15698) 3,16

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INTEREST OF *AMICI CURIAE*[1]

The Lawyers' Committee for Civil Rights Under Law is a tax-exempt, nonprofit civil rights legal organization founded in 1963 by the leaders of the American bar at the request of President Kennedy, to provide legal representation to the victims of civil rights violations. Its members include former Attorneys General, former Assistant Attorneys General for the Civil Rights Division of the Justice Department, former Chairs of the Equal Employment Opportunity Commission, former Secretaries of Cabinet Departments, law school deans and professors, and many of the nation's leading lawyers. Over the last thirty-three years, the Lawyers' Committee and local Committees in Boston, Chicago, Denver, Los Angeles, Philadelphia, San Antonio, San Francisco, and Washington have represented members of minority groups and women in hundreds of civil rights cases.

The American Association of Retired Persons ("AARP") is a nonprofit membership organization of persons age 50 and older that is dedicated to addressing the needs and interests of older Americans. More than one-third of AARP's thirty million members are employed. One of AARP's primary objectives is to strive to achieve dignity and equality in the workplace through positive attitudes, practices, and policies towards work and retirement. In pursuit of this objective, AARP has, since 1985, filed more than 150 *amicus curiae* briefs before this Court and the Federal appellate and district courts.

This case presents the issue of whether a collective bargaining agreement may serve as a compulsory pre-dispute arbitration agreement—and thus preclude a civil action—within the scope of this Court's decision in *Gilmer v. Interstate /*

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[1] The position that the Lawyers' Committee and AARP take in the following brief has not been approved or financed by petitioner or his counsel. No counsel for any party had any role in authoring this brief. The written consents of both parties have been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3(a).

Johnson Lane Corp., 500 U.S. 20 (1991). Because the Lawyers' Committee and AARP represent many unionized employees, the outcome of this case is critical to its efforts to enforce the civil rights of those clients. The Court's decision may also have collateral effects for arbitration of employment disputes in all settings, an issue in which the Lawyers' Committee and AARP—owing to their civil rights caseload—have an especially keen interest.

SUMMARY OF ARGUMENT

There is no federal statutory basis for enforcement of the arbitration provisions of the instant collective bargaining agreement. The Federal Arbitration Act (FAA) does not extend to contracts of employment, as is the case here, of workers in the transportation industry. Similarly, the Labor Management Relations Act (LMRA) does not permit the general arbitration provisions at issue to bar judicial enforcement of Petitioner's statutory civil rights claim. Under the LMRA, not only must a waiver of statutory rights under a labor contract be clear and unmistakable—a requirement that was not satisfied here—but a union may not bargain away the statutory rights of employees beyond the labor-management arena.

Enforcement of the collective bargaining agreement's arbitration provisions to cover Petitioner's statutory civil rights claim would also squarely conflict with this Court's decision in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). The interests of the union, which represents the collective, and those of the individual, whose rights are the subject of the civil rights acts, can differ significantly. *Alexander* therefore held that the prior grievance and arbitration of claims under a collective bargaining agreement does not preclude a civil action under Title VII. Because the tension between majoritarian and individual interests remains as salient today as in the past, *Alexander* should be reaffirmed, and Petitioner's ability to secure a judicial forum for resolution of his federal statutory claim should be preserved.

More broadly, the types of arbitration provisions that are intended to cover statutory claims vary widely in quality and fairness. Many employers simply impose procedures of their own devising on their applicants and employees, without any negotiation. As a result, some employees who are victims of civil rights violations are unable to pursue and obtain effective relief through the arbitration process. Before enforcing arbitration provisions for the adjudication of civil rights claims, courts should ensure that, at a minimum, five factors are met: (1) the waiver of a judicial forum is knowing and voluntary; (2) the employee's exercise of the arbitration right does not require undue cost or burden; (3) arbitration remedies are coextensive with those provided by the statute at issue; (4) the arbitration process is fair; and (5) arbitration awards are subject to meaningful judicial review.

ARGUMENT

I. THE LABOR MANAGEMENT RELATIONS ACT, RATHER THAN THE FEDERAL ARBITRATION ACT, GOVERNS THIS CASE

The lower court did not directly address the federal statutory basis for enforcement of the arbitration provisions of the collective bargaining agreement. There are two possibilities: (1) the FAA, 9 U.S.C. § 1 *et seq.*; or (2) section 301 of the LMRA, 29 U.S.C. § 185. The FAA codifies enforcement of arbitration clauses in federal law, and provided the statutory framework for *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), which held that a pre-dispute arbitration agreement imposed by the New York Stock Exchange as a condition of registration as a broker-dealer extended to the employee's claims under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* ("ADEA"). But as *Gilmer* recognized, § 1 of the FAA excludes arbitration of "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[2] 500 U.S. at 25 n.2.

Although labor contracts would appear to be excluded from the scope of the FAA, the Court has yet to interpret the § 1 exclusion[3] and the courts of appeals have been divided for decades over its scope. Some courts hold that the clause excludes all labor contracts from coverage,[4] others hold that the exclusion is limited to contracts of employment in the transportation industry,[5] and a third group adopts different interpretations depending on whether the contract is collectively bargained or individual.[6] The Fourth Circuit falls into the last of these camps, holding that the FAA does not apply to collective bargaining agreements.[7] Yet even by the narrowest interpreta-

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[2] *See* Matthew W. Finkin, *"Workers' Contracts" Under the United States Arbitration Act: An Essay in Historical Clarification*, 17 Berk. J. of Employ. & Lab. L. 131 (1996) (history of the FAA § 1 exclusion).

[3] In *Gilmer*, the Court reserved the issue whether FAA § 1 excludes employment contracts, 500 U.S. at 25 n.2, while the dissent would have found that the FAA categorically excludes them, *id.* at 36–43. In *United Paperworkers Int'l Union v. Misco*, Inc., 484 U.S. 29, 40 n.9 (1987), the Supreme Court stated, without particular discussion of the issue, that the FAA did not apply to a labor contract at a paper converting plant. *See also Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957) (applying § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, to collective bargaining agreement without mentioning FAA), *and id.* at 466 (Frankfurter, J. dissenting) (concluding that FAA did not apply to labor contract).

[4] The Ninth and Tenth Circuits hold that FAA § 1 excludes all collective bargaining agreements. *See, e.g., American Postal Workers Union v. United States Postal Service*, 861 F.2d 211, 215 n.2 (9th Cir. 1988); *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1454 (10th Cir. 1997), *cert. filed*, 66 U.S.L.W. 3137 (U.S. Aug. 6, 1997) (No. 97–232). *But see Nelson v. Cyprus Bagdad Copper Corp.*, 119 F.3d 756, 759–60 n.4 (9th Cir. 1997) (scope of FAA exemption for individual employment agreements "remains an open question in this Circuit"), *cert. denied*, 66 U.S.L.W. 3474 (U.S. Apr. 20, 1988) (No. 97–1137).

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[5] The Second, Third, Seventh, Eighth, and D.C. Circuits have all adopted this position. *Maryland Casualty Co. v. Realty Advisory Board*, 107 F.3d 979, 982 (2d Cir. 1997); *Tenney Engineering, Inc. v. United Electrical Radio and Machine Workers*, 207 F.2d 450, 452 (3d Cir. 1953) (*en banc*); *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 356–60 (7th Cir.), *cert. denied*, 118 S. Ct. 295 (1997); *Cole v. Burns Int'l Security Services*, 105 F.3d 1465, 1470–72 (D.C. Cir. 1997); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 835–36 (8th Cir. 1997). The Eleventh Circuit recently assumed in one opinion that the FAA applied to an employment contract, but did not decide the issue because the record was not fully developed. *Paladino v. Avnet Computer Technologies, Inc.*, 134 F.3d 1054, 1056 n.1 (11th Cir. 1998).

[6] The First, Fifth and Sixth Circuits report conflicting decisions. *Compare Posadas de Puerto Rico v. Association de Empleados*, 873 F.2d 479, 482 (1st Cir. 1989); *Int'l Union of Electrical, Radio & Machine Workers v. Ingram Mfg. Co.*, 715 F.2d 886, 889 (5th Cir. 1983), *cert. denied*, 466 U.S. 928 (1984); *Occidental Chemical Corp. v. Int'l Chemical Workers Union*, 853 F.2d 1310, 1315 (6th Cir. 1988) (all holding that FAA § 1 excludes collective bargaining agreements) *with Dickstein v. DuPont*, 443 F.2d 783, 785 (1st Cir. 1971); *Rojas v. TK Communications Inc.*, 87 F.3d 745, 748 (5th Cir. 1996); *Asplundh Tree Experts Co. v. Bates*, 71 F.3d 592, 596–602 (6th Cir. 1995) (all holding that FAA § 1 does not exclude individual contracts of employment, other than in the transportation sector).

[7] *Compare Austin v. Owens–Brockway Glass Container, Inc.*, 78 F.3d 875, 879 (4th Cir.), *cert. denied*, 117 S. Ct. 432 (1996); *Consolidation Coal Co. v. Local 1643, United Mine Workers of America*, 48 F.3d 125, 128–29 (4th Cir. 1995); *Domino Sugar Corp. v. Sugar Workers Local Union 392*, 10 F.3d 1064, 1067 (4th Cir. 1993); *Sine v. Local No. 992 Int'l*

tion of the exclusion, this collective bargaining agreement would be excluded from the FAA because Mr. Wright is employed in the transportation industry as a longshoreman. (JA 50a.)

Moving then to the second possible statutory basis for respondent's enforcement of this agreement, the LMRA, two obstacles were not recognized by the court below. *First*, a waiver of statutory rights under a labor contract must be clear and unmistakable, *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983), while courts proceeding under the FAA must indulge every ambiguity in favor of arbitration. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995). Here, the agreement failed to recite clearly and unmistakably that members of the bargaining unit would be barred from bringing private rights of action under the ADA or other civil rights statutes. *Second*, a union does not have license to bargain away the statutory rights of employees beyond the labor-management arena. *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 740–41 (1981). Indeed, this Court has specifically held that Title VII rights could not be bargained away in a collective bargaining agreement. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51–52 (1974). These statutory standards, rather than the commercially-oriented provisions of the FAA, properly govern this case and compel reversal of the judgment below.

Brotherhood, 644 F.2d 997, 1002 (4th Cir.), *cert. denied*, 454 U.S. 965 (1981); *United Electrical, Radio & Machine Workers of America v. Miller Metal Products, Inc.*, 215 F.2d 221, 224 (4th Cir. 1954) (FAA § 1 excludes collective bargaining agreements), *with O'Neil v. Hilton Head Hospital*, 115 F.3d 272, 274 (4th Cir. 1997) ("contracts of employment" exclusion covers individual employment agreements only in the transportation industry).

II. *ALEXANDER v. GARDNER-DENVER CO.* WAS CORRECTLY DECIDED AND SHOULD BE REAFFIRMED

As recently as this Term, this Court emphasized that "it is this Court's prerogative alone to overrule one of its precedents." *State Oil Co. v. Khan*, 118 S. Ct. 275, 284 (1997). Yet in *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 880 (4th Cir.), *cert. denied*, 117 S. Ct. 432 (1996), the Fourth Circuit preemptively declared *Alexander* effectively overruled by *Gilmer*. No other Circuit has taken this step.[8]

Alexander was correctly decided and should be reaffirmed. Petitioner and his *amici* present a variety of arguments in support of *Alexander*. We join in these arguments, and summarize here just a few of the problems presented when unions are placed in exclusive charge of workplace civil rights enforcement. To put this matter in perspective, antidiscrimination clauses are nearly universal in labor contracts.[9] Yet it is unions, not employees, that decide which grievances to pursue.[10] They may turn down claims that they do not want to pursue, whether to conserve political capital for other battles or for other reasons unrelated to the merits of the claims. *Barrentine*, 450 U.S. at 742; *Vaca v. Sipes*, 386 U.S. 171, 191–92 (1967). This approach, while perhaps fitting for enforcement of purely contractual rights, is incompatible with the individual rights at stake under the civil rights acts. As this Court recognized in *Alexander*, 415 U.S. at 51, Title VII "concerns not majoritarian processes, but an individual's right to equal employment opportunities."[11] Indeed, history has shown that a union's majoritarian interests periodically clash with the interests of minority employees, particularly in the area of seniority. *See, e.g., Franks v. Bowman Transportation Co.*, 424 U.S. 747, 773–79 (1976).

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[8] *Penny v. United Parcel Serv.*, 128 F.3d 408, 414 (6th Cir. 1997); *Brisentine v. Stone & Webster Eng'g Corp.*, 117 F.3d 519, 526 (11th Cir. 1997); *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1453 (10th Cir.), *petition for cert. filed*, 66 U.S.L.W. 3137 (U.S. Aug. 6, 1997) (No. 97-232); *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 363 (7th Cir.), *cert. denied*, 118 S. Ct. 294, 295 (1997); *Varner v. National Super Markets, Inc.*, 94 F.3d 1209, 1213 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 946 (1997); *Tran v. Tran*, 54 F.3d 115, 117 (2d Cir. 1995).

[9] The Bureau of National Affairs, *Basic Patterns in Union Contracts* 131–32 (13th ed. 1992) (survey of CBAs revealed that 97% of them included such clauses).

[10] A partial exception to this is the Railway Labor Act § 3 First (i), (j), 45 U.S.C. § 153 First (i), (j), and 45 U.S.C. § 184, which creates a

Unions, too, would buckle under the demands of full-time civil rights enforcement. Their ability to turn down civil rights grievances against employers would be sharply limited because of the risk of incurring their own civil rights liability. *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 664–69 (1987). The hydraulic pressure would put unions to an unholy choice: either divert limited resources to civil rights claims, potentially driving the unions into receivership or extinction, or drop the antidiscrimination provisions from labor contacts, thereby depriving employees of the option of filing a grievance to challenge discriminatory practices. Even though antidiscrimination clauses have been with us for decades, employers only recently began to demand that discrimination claims be grieved. These demands exploit the holding in *Gilmer* to serve employers' goals of barring civil litigation and imposing financial and

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statutory right for employees to submit grievances to adjustment boards.

[11] *See also Livadas v. Badshaw*, 512 U.S. 107, 127 n.21 (1994) (reiterating concern from *Alexander* about majoritarian processes); *Pryner*, 109 F.3d at 363 (rejecting employer's position which "delivers the enforcement of the rights of these minorities into the hands of the majority").

political pressure on unions.

The preclusive effect that arbitration awards should have on later proceedings is also a significant question. *Austin*, 78 F.3d at 878 n.1, held that an applicable labor arbitration agreement "ousts a court of jurisdiction . . . ." In the present case, the district court relied upon *Austin* and dismissed the action without prejudice for lack of subject matter jurisdiction, and the Fourth Circuit affirmed. However, this Court in *Alexander* held that an unsuccessful arbitration under a collective bargaining agreement does not foreclose a *de novo* civil action by the employee under Title VII. *Alexander*, 415 U.S. at 59–60; *see also McDonald v. City of West Branch*, 466 U.S. 284, 292 (1984) (unappealed arbitration of § 1983 civil rights claim has no collateral effect on subsequent judicial proceedings). The rulings of the courts below cannot be squared with *Alexander*, and this Court should reaffirm that grieving and arbitrating a statutory civil rights claim under a collective bargaining agreement is not a predicate to maintaining a judicial action to enforce statutory rights.

III. THE LARGER CONTEXT OF THIS CASE DEMONSTRATES THE NEED FOR FURTHER GUIDANCE ON THE ARBITRATION OF CIVIL RIGHTS CLAIMS

Gilmer did not envision that the use of arbitration processes to resolve statutory civil rights claims would entail a transformation of the respective rights of employers and members of a protected class. Indeed, it presumed that parties to an arbitration agreement would "'not forgo the substantive rights afforded by the statute,'" and that the arbitral forum would afford claimants a fair opportunity to present their claims and obtain legal and equitable remedies. *Gilmer*, 500 U.S. at 26, 31–32 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)). George Nicolau, a past president of the National Academy of Arbitrators, observed that a voluntary arbitration system living up to the promise of *Gilmer* would, of its own accord, attract employees who desired a prompt hearing of their claims.[12]

Contrary to these aspirations, some employers have abused the opening presented by *Gilmer* to pursue an agenda inimical to civil rights. The labor market has become flooded with arbitration agreements,[13] flowing down even to high school-age store clerks. *See Sheller by Sheller v. Frank's Nursery & Crafts, Inc.*, 957 F. Supp. 150, 154 (N.D. Ill. 1997) (teenage cashiers bringing sex harassment suit against retailer barred by arbitration clause in their employment applications). These "agreements," often imposed involuntarily on a captive workforce, vary widely in quality and fairness. Some agreements that have come to public attention force workers to bear half of the often substantial costs of arbitration, surrender rights to damages and attorneys' fees, or proceed under one-sided rules. *See Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith*, 76 F.E.P. Cases (BNA) 681, 694–700 (D. Mass. 1998) (finding "structural bias in the system" caused by the fact that the New York Stock Exchange arbitration system is dominated by the securities industry). Nicolau, *supra* note 12, at 181–182 (describing a plan that waived punitive damages and allowed no

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[12] *See, e.g.*, George Nicolau, Gilmer v. Interstate/Johnson Lane Corp.: *Its Ramifications and Implications for Employees, Employers and Practitioners*, 1 U. PA. J. OF LAB. AND EMPLOY. LAW 175, 189-90 (1998) (forthcoming).

[13] *See, e.g.*, Michael A. Verespej, *Sidestepping Court Costs*, Industry Week, Feb. 2, 1998, at 68 (more than 400 employers, with a combined 4.5 million employees, have subscribed to some form of alternative dispute resolution for employment claims, mostly within the past two years); Leslie Kaufman and Anne Underwood, *Sign or Hit the Street*, Newsweek, June 30, 1997, at 48 (noting that employers such as ITT, JCPenney, Brown & Root, and Renaissance Hotels adopted arbitration systems for employment disputes).

discovery besides an exchange of exhibits and witness lists).[14] Concerns with the fairness of imposed arbitration procedures have recently led the National Academy of Arbitrators to state that it "opposes mandatory employment arbitration as a condition of employment when it requires waiver of direct access to either a judicial or administrative forum for the pursuit of statutory rights," and to urge its members conducting such arbitrations to conduct their own independent evaluation of the fairness of the procedures.[15] Many arbitrators, of course, may not do so because their livelihoods are at stake. Without adequate procedural and substantive safeguards, a worker's involuntary "agreement" to arbitrate may thus become nothing more than a prospective waiver of civil rights, an approach that this Court decisively rejected in *Alexander*, 415 U.S. at 51–52 ("an employee's rights under Title VII are not susceptible of prospective waiver").

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[14] Commentators have written widely about the abuses of arbitration in the employment arena. *See, e.g.*, Reginald Alleyne, *Statutory Discrimination Claims: Rights "Waived" and Lost in the Arbitration Forum*, 13 Hofstra Lab. L. J. 381 (1996); Joseph R. Grodin, *Arbitration of Employment Discrimination Claims: Doctrine and Policy in the Wake of* Gilmer, 14 Hofstra Lab. L. J. 1 (1996); H. David Kelly, Jr., *An Argument for Retaining the Well Established Distinction Between Contractual and Statutory Claims in Labor Arbitration*, 75 Univ. of Det. Mercy L. Rev. 1 (1997); Martin H. Malin, *Arbitrating Statutory Employment Claims in the Aftermath of* Gilmer, 40 St. Louis U. L. J. 77 (1996); Donna Meredith Matthews, *Employment Law After* Gilmer: *Compulsory Arbitration of Statutory Anti-Discrimination Rights*, 18 Berkeley J. of Employment & Lab. L. 347 (1997); Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contracts for the 1990s*, 73 Denv. U. L. Rev. 1017 (1996).

[15] *See* National Academy of Arbitrators, *Statement of the NAA on Individual Contracts of Employment and Guidelines on Arbitration of Statutory Claims Under Employer-Promulgated Systems*, May 21, 1997 (available at http://www.naarb.org/guidelines.html).

Numerous, unresolved issues surround the arbitration of civil rights claims.[16] Unlike the arbitration of claims in the securities industry, which is regulated by the Securities and Exchange Commission, *see* 15 U.S.C. § 78s; *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 233-34 (1987), there is no overarching federal executive authority for civil rights arbitration.[17] Because the lower courts are divided over these issues, there is a pressing need for clarity as to the required elements of a fair and effective arbitration process.

A. Agreements to Arbitrate Should Be Knowing and Voluntary

Amici have witnessed many attempts by employers to impose arbitration unilaterally as a condition of continued employment or consideration for employment. For instance, some employers include unilateral arbitration provisions in their employment manuals or written policies. *See EEOC v. River Oaks Imaging and Diagnostic*, 67 F.E.P. Cases (BNA) 1243 (S.D. Tex. 1995) (employer adopts arbitration agreement in the

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[16] Already during the present Term, the Court has denied certiorari in several cases raising issues about arbitration of civil rights claims. *DiRussa v. Dean Witter Reynolds Inc.*, 121 F.3d 818 (2d Cir. 1997) (denial of attorneys' fees to prevailing plaintiff), *cert. denied*, 118 S. Ct. 695 (1998); *Nelson v. Cyprus Bagdad Copper Co.*, 119 F.3d 756 (9th Cir. 1997) (arbitration clause in employment manual not enforceable), *cert. denied*, 66 U.S.L.W. 3474 (U.S. Apr. 20, 1998) (No. 97-1137); *Great Western Mortgage Corp. v. Peacock*, 110 F.3d 222 (3d Cir.) (enforced arbitration clause over employee's objection that the clause was coercive), *cert. denied*, 118 S. Ct. 299 (1997); *Cosgrove v. Shearson Lehman Bros.*, 105 F.3d 659 (6th Cir.) (unpublished order) (arbitration agreement in employment application enforceable), *cert. denied*, 118 S. Ct. 169 (1997).

[17] The EEOC's regulatory authority under Title VII and the ADA is largely hortatory. 42 U.S.C. § 2000e-12 (Title VII); 42 U.S.C. § 12116 (Americans With Disabilities Act).

midst of an EEOC investigation). While some courts have rejected such involuntary programs,[18] most courts have upheld the right of employers to enforce these policies based solely on the willingness of employees to continue working, or of applicants to continue applying.[19]

The Circuits are split on the question whether relinquishment of the federal judicial forum and jury right requires a knowing and voluntary waiver, or is governed instead by ordinary contract principles. Most courts have applied a contract standard, holding that arbitration must be compelled except in cases tainted by fraud or coercion.[20] However, the Ninth Circuit, in *Prudential Insurance Company of America v.*

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[18] *Sportelli v. Circuit City Stores, Inc.*, No. CIV. A. 97–5850, 1998 WL 54335 (E.D. Pa. Jan 13, 1998) (finding that employee opted out of company arbitration program); *Nadeau v. Thomas*, No. 96–20383, 1997 WL 542708 at *3–4 (N.D. Cal. Aug 21, 1997).

[19] *Nghiem v. NEC Electronic, Inc.*, 25 F.3d 1437, 1439–40 (9th Cir.) (enforcing policy in employment manual), *cert. denied*, 513 U.S. 1044 (1994); *Bishop v. Smith Barney, Inc.*, No. 97 CIV. 4807(RWS), 1998 WL 50210 (S.D.N.Y. Feb. 6, 1998) (enforcing arbitration clause in employee manual without individual assent; written company policy sufficient under FAA); *Leonard v. Clear Channel Communications I*, No. 972320-D/A, 1997 WL 581439 (W.D. Tenn. July 23, 1997) (enforcing unsigned, unacknowledged arbitration agreement in employment manual).

[20] *See, e.g.*, *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 834–35 (8th Cir. 1997); *Great Western Mortgage Corp. v. Peacock*, 110 F.3d at 229–30; *Battle v. Prudential Ins. Co.*, 973 F. Supp. 861, 864–67 (D. Minn. 1997); *Beauchamp v. Great West Life Assurance Co.*, 918 F. Supp. 1091, 1097–98 (E.D. Mich. 1996); *Maye v. Smith Barney, Inc.*, 897 F. Supp. 100, 107 (S.D.N.Y. 1995); *see also Gibson v. Neighborhood Health Clinics, Inc.*, 121 F.3d 1126, 1129–30 (7th Cir. 1997) (noting split of authority and declining to decide whether contract or waiver standard applies).

Lai, 42 F.3d 1299, 1304–05 (9th Cir. 1994), *cert. denied*, 516 U.S. 812 (1995), has held that the "text and legislative history of Title VII" required that an employee "knowingly agree[] to submit such disputes to arbitration."[21]

The "knowing and voluntary" standard flows from the standard generally applied to the waiver of a civil jury trial. *See Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937) ("as the right of [civil] jury trial is fundamental, courts indulge every reasonable presumption against waiver"); *KMC Co. v. Irving Trust Co.*, 757 F.2d 752, 756 (9th Cir. 1985) (courts "overwhelmingly appl[y] the knowing and voluntary standard" to determine "the validity of a contractual waiver of [a civil] jury trial"); Grodin, *supra* note 14, at 36–39. A waiver standard also comports with the history of the Civil Rights Act of 1991. Section 118 of the Act states that "[w]here appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including . . . arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title." Pub. L. No. 102–166, § 118, 105 Stat. 1071, 1081 (1991).[22] The Seventh Circuit interpreted this provision in *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 363 (7th Cir.), *cert. denied*, 118 S. Ct. 295 (1997) (Posner, C.J.), to hold that arbitration would not be "appropriate when it is not agreed to by the worker but instead is merely imposed," as by a collective bargaining agreement. The *Pryner* court also relied on unchallenged history, observing that "by being forced into binding arbitration [employees] would be surrendering their right to trial by jury — a right that civil rights plaintiffs . . . fought hard for and finally obtained in the 1991 amendments to Title VII." *Id.* at 362. *See also Rosenberg*, 76 F.E.P. Cases (BNA) at 694 (1991 Act affirmed primacy of jury trials for Title VII cases).

The collective bargaining agreement in this case was not a knowing and voluntary waiver of Petitioner's rights under the ADA. As this Court noted in *Alexander*, while unions are generally empowered to waive the bargaining unit's statutory rights related to collective activity, such as the right to strike, individual civil rights are different:

> Title VII's strictures are absolute and represent a congressional command that each employee be free from discriminatory practices. Of necessity, the rights conferred can form no part of the collective-bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII. In these circumstances, an employee's rights under Title VII are not susceptible of prospective waiver.

Alexander, 415 U.S. at 51–52. This Court has reaffirmed this point twice since *Alexander*, both in *Gilmer*, 500 U.S. at 35 (under a collective bargaining agreement, employees do not agree to arbitration of their own statutory claims), and in *Livadas v. Bradshaw*, 512 U.S. 107, 127 n.21 (1994) (reiterating concern from *Alexander* about majoritarian processes). Any waiver of "an individual's rights to equal opportunities," *Alexander*, 415 U.S. at 51, should be on a "knowing and voluntary" basis, under which the employee is given an informed and individual choice either to accept arbitration and its presumed benefits or to retain his or her right to a judicial forum and jury trial.

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[21] *See also Nelson v. Cyprus Bagdad Copper Corp.*, 119 F.3d 756, 760–61 (9th Cir. 1997) (applying the holding of *Lai* to the ADA), *cert. denied*, 66 U.S.L.W. 3474 (U.S. Apr. 20, 1998) (No. 97–1137); *Hooters of America, Inc. v. Phillips*, C.A No. A:96–3360–22, at 53 (D.S.C. Mar. 12, 1998) (applying knowing and voluntary standard to review of arbitration clause asserted by employer in sex harassment case); *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith*, 965 F. Supp. 190, 202 (D. Mass. 1997) (applying knowing and voluntary standard to waiver of jury right in sex discrimination case); Matthews, *supra* note 14, at 381-85.

[22] *See also* H.R. Rep. No. 102–40, Part I, 102d Cong. 1st Sess., *reprinted in* 1991 U.S.C.C.A.N. 549, 635 (stating that this section was "intended to supplement, not supplant, the remedies provided by Title VII"); 42 U.S.C. § 12212 (same provision for the ADA).

B. Arbitration Agreements Should Not Impose Potentially Onerous Costs on The Claimant

If arbitration were fair, it could be voluntary and many employees may sign up for it. As long as employers are free to impose arbitration on their employees, however, they can add onerous terms without loss of employee participation. Thus, employers have generally sought to shift some or all of the costs of arbitration to the complaining party. *See, e.g.*, Appellant's Opening Brief at 34–36, *Duffield v. Robertson Stephens & Co.* (pending 9th Cir.) (No. 97–15698) (record of proceeding established that arbitrators in the securities field charge fees starting from $1,000 per half-day, mounting up to a total of $82,800 in one complex case, and such fees are imposed on each party); Alleyne, *supra* note 14, at 410–11 (noting that arbitrators' fees can run from hundreds to thousands of dollars). An employee notified by letter, as often happens in practice, that she must within a few days pay several hundred—or even thousands of—dollars in fees prior to arbitration can be deterred from pursuing even a meritorious claim. Common sense suggests that this happens frequently.

A few courts confronting this situation have barred fee shifting.[23] Yet this issue is only in its infancy and it remains to

be seen whether other courts may resolve the issue differently.[24]

C. Arbitration Procedures Must Provide Remedies And Safeguards Coextensive With Those Available in a Judicial Forum

Gilmer recognized as a precondition to arbitration that the parties may "not forgo the substantive rights afforded by the statute; [the agreement] only submits to their resolution in an arbitral, rather than a judicial, forum." *Gilmer*, 500 U.S. at 26 (quoting *Mitsubishi*, 473 U.S. at 628). As Congress has decided, a panoply of remedies and statutory safeguards is essential to deter and remedy discrimination, both in particular cases and throughout our society. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416 (1975) (remedies available under Title VII constitute a "complex legislative design directed at an historical evil of national proportions").

Notwithstanding *Gilmer*'s careful reservation, employers have forced workers to waive statutory rights and remedies. *See, e.g., Pala[illegible]o v. Avnet Computer Technologies, Inc.*, 134 F.3d 1054, 1060–62 (11th Cir. 1988) (arbitration clause that

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[23] *See, e.g., Cole v. Burns Int'l Security Services*, 105 F.3d 1465, 1485 (D.C. Cir. 1997) (interpreting the fees provision from the arbitration agreement to apply only to the employer, and holding that it is impermissible to charge the employee for all or part of the arbitrator's fees and expenses); *McWilliams v. Logicon, Inc.*, No. CIV. A. 95–2500–GTV, 1997 WL 383150, at *2 (D. Kan. June 4, 1997) (holding that employer must pay the arbitrator's fee); *Shankle v. B-G Maintenance Mgt. of Colorado, Inc.*, 74 F.E.P. Cases (BNA) 94, 96 (D. Colo. 1997) (contract requiring plaintiff to shoulder one-half of fee for arbitrator, including half of a $6000 deposit, held unenforceable). As the D.C. Circuit held in *Cole*, 105 F.3d at 1485, a plaintiff "could not be required to agree to arbitrate his public law claims as a condition of employment if the arbitration agreement required him to pay all or part of the arbitrator's fees and expenses." *See also* Alleyne, *supra* note 14, at 410–11 (noting the risks of excess costs to the integrity of arbitration, no matter who pays); Grodin, *supra* note 14, at 44-45 (elimination, or at least lowering, of financial barriers essential to fair arbitration).

[24] *Cf. Rollins Inc. v. Foster*, No. Civ.A. 97-T-945-N, 1998 WL 25702, at *9–11 (M.D. Ala. Jan. 20, 1998) (rejecting unconscionability challenge to arbitration clause in homeowner's agreement with pest control company that required homeowner to pay arbitration fees).

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provides only for award of contract damages) (Cox and Tjoflat, JJ., concurring); *DeGaetano v. Smith Barney, Inc.*, 983 F. Supp. 459, 464–70 (S.D.N.Y. 1997) (barring award of statutory attorneys' fees); *Johnson v. Hubbard Broadcasting, Inc.*, 940 F. Supp. 1447, 1462 (D. Minn. 1996) (holding that if arbitrator finds that provision requiring both parties to bear own attorneys' fee bars award of fee to prevailing plaintiff, agreement would be unenforceable); *Alcaraz v. Avnet, Inc.*, 933 F. Supp. 1025, 1027–28 (D.N.M. 1996) (employee's Title VII and ADA claims not subject to arbitration because agreement did not provide full range of statutory damages). While these efforts to limit the rights of claimants are stopped by some courts such as the above, other courts let them pass and the mere existence of such efforts shows that some employers cannot resist the temptations they think *Gilmer* allows them.

The Third Circuit has given tacit approval to this approach, allowing that such terms may be enforced by an arbitrator. In *Great Western Mortgage Corp. v. Peacock*, 110 F.3d 222, 231–32 (3d Cir.), *cert. denied*, 118 S. Ct. 299 (1997) the arbitration agreement included provisions waiving the employee's right to attorneys' fees and punitive damages, and imposing a two-year statute of limitations on her state law discrimination claims. The court did not hold the terms unenforceable as a matter of law, but instead referred the matters to the arbitrator to determine whether the plaintiff had in fact agreed to abandon statutory rights. *See also Kinnebrew v. Gulf Insurance Co.*, 67 F.E.P. Cases (BNA) 189, 191 (N.D. Tex. 1994) (referring claim to arbitration under policy that bars punitive damages, injunctive relief and attorneys' fees). By referring these matters to arbitration, the courts may simply have deferred litigation until the time to enforce the award, thus undermining the expectation that arbitration will afford prompt and inexpensive relief. *See Pryner*, 109 F.3d at 362 (noting the "spectre" of satellite litigation).

In this case, the contract denied Mr. Wright not only his personal right to control his own claim, but also sufficient time

to make his claim. Under the collective bargaining agreement at issue, Mr. Wright was allowed only 48 hours to file a grievance, the first step for invoking arbitration. (JA 55a.) In contrast, under the Americans with Disabilities Act, Mr. Wright would otherwise have had 300 days to file a charge with the Equal Employment Opportunity Commission. 42 U.S.C. § 12117(a) (adopting Title VII enforcement procedures); 42 U.S.C. § 2000e–5(e) (providing time for filing charges).

The period provided by many collective bargaining agreements short-circuits the schedule set forth by Congress for reporting violations of civil rights. Such a limitations period should not be enforced because it fails "to take into account practicalities that are involved in litigating federal civil rights claims and policies that are analogous to the goals of the Civil Rights Act." *Burnett v. Grattan*, 468 U.S. 42, 49 (1984) (holding that the district court erred when it borrowed Maryland's six-month limitations period for administrative filing of civil rights charge for section 1981 lawsuit).

Arbitration under collective bargaining agreements also hobbles potential injunctive relief. Arbitrators have no power to invalidate or refuse to enforce parts of a collective bargaining agreement. *Barrentine*, 450 U.S. at 745. As this Court held in *United Steelworkers of America v. Enterprise Wheel & Car Co.*, 363 U.S. 593, 597 (1960):

> [A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement.

Courts, by contrast, may enjoin labor agreements. *See, e.g., EEOC v. Board of Governors of State Colleges*, 957 F.2d 424, 429–31 (7th Cir.) (provision that precludes arbitration of any claim after employee files an EEOC charge violates anti-retaliation section of the ADEA), *cert. denied*, 506 U.S. 906 (1992); *Schafer v. Board of Public Education*, 903 F.2d 243, 248 (3d Cir. 1990) (provision of CBA making childrearing leave available for up to one year only for female teachers violates Title VII *per se*). Likewise, arbitrators cannot modify labor agreements,[25] while courts are allowed to do so.[26] Unless the institution of labor arbitration were to be radically transformed, arbitrators will always lack the power to provide remedies outside of the agreement itself.

D. Arbitration Must Provide Fair and Accountable Procedures

The Court established in *Gilmer* that arbitration may substitute for civil litigation only when the alternative forum affords fundamental procedural protections. *Gilmer*, 500 U.S.

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[25] *See, e.g., Excel Corp. v. United Food & Commercial Workers*, 102 F.3d 1464, 1468 (8th Cir. 1996); *Walker v. Consolidated Freightways Inc.*, 930 F.2d 376, 381 (4th Cir.), *cert. denied*, 502 U.S. 1004 (1991); *Hoteles Condado Beach, La Concha and Convention Center v. Union de Tronquistas Local 901*, 763 F.2d 34, 41 (1st Cir 1985); *Teamsters, Chauffeurs, Warehousemen, Helpers and Food Processors, Local Union 657 v. Stanley Structures, Inc.*, 735 F.2d 903, 905 (5th Cir. 1984).

[26] This Court approved an award of retroactive seniority in *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 773–79 (1976), over an employer's argument that it would violate seniority expectations of other employees in the bargaining unit. *See also Sears v. Bennett*, 645 F.2d 1365, 1378 (10th Cir. 1981) (award of seniority to plaintiffs within broad discretion of court), *cert. denied*, 456 U.S. 964 (1982); *EEOC v. United Air Lines, Inc.*, 560 F.2d 224, 234 (7th Cir. 1977) (CBA may be modified to grant enhanced seniority), *cert. denied*, 434 U.S. 1063 (1978).

at 30–32.[27] However, the case law reveals instances in which employers have attempted to impose one-sided procedures. Two district courts this year have, after extensive evidentiary submissions, thrown out arbitration policies that were biased against employees. In *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith*, 76 F.E.P. Cases (BNA) 681, 694–700 (D. Mass. 1998), for example, the district court reviewed the New York Stock Exchange arbitration system and held that domination of decision-making by agents of the securities industry rendered it an unfit forum for civil rights actions. *See also Hooters of America, Inc. v. Phillips*, C.A No. A:96-3360-22 (D.S.C. Mar. 12, 1998) (rejecting arbitration policy that barred depositions, did not provide for neutral arbitrators, limited allowable damages, and barred award of attorneys' fees).

A significant problem in the labor field is the secrecy of arbitration decisions. Labor arbitration awards are usually confidential,[28] yet publication of decisions in the civil rights field serves an irreplaceable public good. Private civil rights litigation is the engine that drives enforcement of America's antidiscrimination laws. *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 602 (1981) ("[t]he private right of action remains an important part of Title VII's scheme of enforcement . . . [and] Congress considered the charging party a 'private attorney general,' whose role in enforcing the ban on discrimination is parallel to that of the Commission itself"); *Alexander*, 415 U.S. at 45 ("Congress gave private individuals a significant role in enforcement process of Title VII"). Published opinions are integral to this function: they are necessary to educate employers and employees alike about the norms of civil rights law. *See Rosenberg*, 76 F.E.P. Cases (BNA) at 687–88; Adriaan Lanni, Note, *Protecting Public Rights in Private Arbitration*, 107 Yale L. J. 1157, 1160–61 (1998) (encouraging disclosure of arbitration decisions); Stone, *supra* note 14, at 1043–47 (discussing educational function of civil rights opinions). In *Gilmer*, the Court recognized the need for public opinions, noting that enforcement of the U-4 form arbitration clause would not harm civil rights enforcement because New York Stock Exchange rules require written and publicly available arbitration awards, and "judicial decisions addressing ADEA claims will continue to be issued because it is unlikely that all or even most ADEA claimants will be subject to arbitration agreements." 500 U.S. at 31–32. Without a mechanism to disseminate the results of civil rights arbitrations, an essential element of civil rights litigation will be lost.

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[27] *See generally* National Academy of Arbitrators Task Force on ADR in Employment, *A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising out of the Employment Relationship*, May 9, 1995 (available at http://www.naarb.org/protocol.html) (signed by representatives of the National Academy of Arbitrators, the American Arbitration Associations, the Labor & Employment Section of the American Bar Association, and other organizations). *See also* Stephen L. Hayford & Michael J. Evers, *The Interaction Between the Employment-at-Will Doctrine and Employer-Employee Agreements to Arbitrate Statutory Fair Employment Practices Claims: Difficult Choices for At-Will Employers*, 73 N.C. L. Rev. 443, 489–90 (1995) (enforceable arbitration system would have to include right to counsel, adequate discovery, mutual selection of arbitrator, ability to call witnesses, and anti-retaliation commitment to cooperating witnesses).

[28] *See Code of Professional Responsibility for Arbitrators of Labor Management Disputes*, art. II, § C(1)(c) (making it a "violation of professional responsibility for an arbitrator to make public an award

E. Arbitration Awards Must Be Subject to Meaningful Judicial Review

In *Gilmer*, the Court stated that judicial review is a corrective to errant arbitrators. 500 U.S. at 30–31. Yet the

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without consent of the parties"), *reprinted at* Jay E. Grenig, 26 WEST LEGAL FORMS: ALTERNATIVE DISPUTE RESOLUTION, App. 11C at 770 (1995).

awards of commercial and labor arbitrations, based on interpretation of agreements freely bargained by the parties, have long been accorded deferential judicial review. *See, e.g., United Steelworkers*, 363 U.S. at 597–99 (where arbitrator's award concerns construction of collective bargaining agreement, court lacks authority to overrule the arbitrator's interpretation); *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 203 n.4 (1956) (no review of arbitrator's error in interpreting contract). This area must be reevaluated in light of the expansion of arbitration to the civil rights arena.

Review of arbitration awards of statutory claims must rise to a level "sufficient to ensure that arbitrators comply with the requirements of the statute." *Shearson/American Express v. McMahon*, 482 U.S. 220, 232 (1987); *see also Gilmer*, 500 U.S. at 32 n.4 (making same point in context of ADEA). The appropriate level of review should necessarily be higher in a case reviewing a statutory employment discrimination claim than in one reviewing garden-variety labor disputes, because arbitrators have "authority only to resolve questions of contractual rights." *Id.* at 34; *see, e.g., McDonald v. City of West Branch*, 466 U.S. at 290 (rejecting suggestion that arbitration can "provide an adequate substitute for a judicial proceeding in protecting the federal statutory and constitutional rights that § 1983 is designed to safeguard"); *Barrentine*, 450 U.S. at 737 ("[w]hile courts should defer to an arbitral decision where the employee's claim is based on rights arising out of the collective bargaining agreement, different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers").

Unfortunately, however, most courts currently do not subject arbitration decisions of statutory claims to sufficient review. In some instances, courts are essentially precluded from reviewing awards because of the absence, as noted above, of written opinions. Indeed, in THE ARBITRATOR'S MANUAL (1996), issued by the Securities Industry Conference on

Arbitration, arbitrators are instructed that they need neither strictly follow decisional law nor issue written opinions. Even when courts are able to review awards, their application of the general standard of review for arbitration awards, "manifest disregard of the law," *First Options of Chicago v. Kaplan*, 514 U.S. 938, 942 (1995), fails to ensure that arbitrators give due regard to statutory requirements. Typical is the Eleventh Circuit's recent decision in *Montes v. Shearson Lehman Brothers, Inc.*, 128 F.3d 1456, 1461 (11th Cir. 1997), holding that reversal of an award for manifest disregard of the law requires proof that the arbitrator was "conscious of the law and deliberately ignore[d] it."[29] Moreover, not all Circuits allow even this paltry standard of merits review. *McIlroy v. Painewebber Inc.*, 989 F.2d 817, 820 n.2 (5th Cir. 1993) (declining to recognize "manifest disregard" standard).

A more appropriate approach to review has been adopted by the D.C. Circuit. While noting that courts ordinarily defer to arbitrator's awards, *Cole* held that the manifest disregard standard is somewhat elastic and "must be defined in light of the bases underlying the Court's decisions in *Gilmer*-type cases." 105 F.3d at 1487. The court explained:

> The nearly unlimited deference paid to arbitration awards in the context of collective bargaining is not required, and not appropriate, in the context of employees' statutory claims. In this context, the Supreme Court has assumed that arbitration awards are subject to judicial review sufficiently rigorous to ensure compliance with statutory law.

Id. at 1468–69. Thus, "there will be some cases in which novel or difficult legal issues are presented demanding judicial judgment. In such cases, the courts are empowered to review an arbitrator's award to ensure that its resolution of public law issues is correct." *Id.* at 1487. However, even *Cole* failed to recognize the need for factual findings to ensure that the law was properly applied to the facts, let alone the need for review of plainly erroneous findings.

CONCLUSION

For the foregoing reasons, we respectfully request that the judgment of the United States Court of Appeals for the Fourth Circuit be reversed.

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[29] *See also Kiernan v. Piper Jaffray Cos., Inc.*, 137 F.3d 588, 594 (8th Cir. 1998) (applying deferential "manifest disregard" standard to civil rights case); *DiRussa v. Dean Witter Reynolds Inc.*, 121 F.3d 818, 821 (2d Cir. 1997), *cert. denied*, 118 S. Ct. 695 (1998) (applying deferential standard to reverse an award in favor of plaintiff that awarded no attorneys' fees to him as a prevailing party); *Chisolm v. Kidder, Peabody Asset Mgt., Inc.*, 966 F. Supp. 218, 224–29 (S.D.N.Y. 1997) (rejecting argument for heightened scrutiny in civil rights cases).

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Supreme Court of the United States

OCTOBER TERM, 1997

CAESAR WRIGHT,
Petitioner,
v.
UNIVERSAL MARITIME SERVICE CORP., ET AL,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Table of Contents.

TABLE OF AUTHORITIES iv

STATEMENT OF AMICUS INTEREST 1

STATEMENT OF FACTS 2

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. THE STATES HAVE AN IMPORTANT INTEREST IN ENSURING THAT THEIR CITIZENS WHO ARE SUBJECT TO COLLECTIVE BARGAINING AGREEMENTS, HAVE ACCESS TO COURTS IN ORDER TO VINDICATE EMPLOYMENT RIGHTS THAT DERIVE FROM STATE AND FEDERAL STATUTES 4

  A. *The Rationale of State Courts for Refusing to Enforce Mandatory Arbitration Agreements is the Distinctive Context of Collective Bargaining* 4

  B. *The Refusal to Enforce Mandatory Arbitration Agreements Is Also Based on the States' Strong Public Interest in Providing a Public Forum for Vindication of Statutory Rights* 8

  C. *Decisions under the Labor and Management Relations Act Recognizing the Right of States to Provide a Judicial Forum to Employees Subject to Collective Bargaining Agreements for Resolution of Independent State Statutory Rights Support the Conclusion that the Fourth Circuit's Decision in*

Wright Should be Reversed 13

II. ASSUMING ARGUENDO THAT THE COURT INTENDED TO OVERRULE ALEXANDER V. GARDNER-DENVERIN GILMER, THAT HOLDING WAS OVERRULED BY CONGRESS WHEN IT PASSED THE 1991 CIVIL RIGHTS ACT 16

CONCLUSION 20

Table of Authorities.

Adkins v. Times-World Corp.,
771 F.2d 829 (4th Cir. 1985), *cert. denied*,
474 U.S. 1109 (1986) 15

Alexander v. Gardner-Denver Co.,
415 U.S. 36 (1974) 12, 17, 18, 19

Allied-Bruce Terminix Cos. v. Dobson,
513 U.S. 265 (1995) 15

Allis-Chalmers Corp. v. Lueck,
471 U.S. 202 (1985) 13

Austin v. Owens-Brockway Glass Container, Inc.,
78 F.3d 875 (4th Cir. 1996) 15

Barrentine v. Arkansas-Best Frieght Sys., Inc.,
450 U.S. 728 (1981) 7, 12

Blanchette v. School Comm. of Westwood,
427 Mass. 176, -- N.E.2d -- (1998) 4, 6, 8

Commission of Labor v. Talbert Mfg. Co.,
593 N.E.2d 1229 (Ind. App. 1992) 5

De Canas v. Bica,
424 U.S. 351 (1976) 14

Fort Halifax Packing Co. v. Coyne,
482 U.S. 1 (1987) 14, 16

Francini v. Phoenix Newspapers, Inc.,
188 Ariz. 576, 937 P.2d 1382 (1996) 6

Genovese v. Gallo Wine Merchants Inc.,
226 Conn. 475, 628 A.2d 946 (1993) 7, 8

Gilmer v. Interstate/Johnson Lane Corp.,
500 U.S. 20 (1991) .... passim

Hawaiian Airlines, Inc. v. Norris,
512 U.S. 246 (1994) 14

Lepore v. National Tool and Mfg. Co.,
224 N.J. Super. 463, 540 A.2d 1296, (1988) 12

Lingle v. Norge Div. of Magic Chef, Inc.,
486 U.S. 399 (1987) 10, 14, 15

Livadas v. Bradshaw,
512 U.S. 107 (1994) 12, 13, 14

McDonald v. City of West Branch,
466 U.S. 284 (1984) 12

Metropolitan Life Ins. Co. v. Massachusetts,
471 U.S. 724 (1984) 14

Mitsubishi Motors v. Soler Chrsyler-Plymouth, Inc.,
473 U.S. 614 (1985) 19

Moses H. Cone Mem'l Hosp. v. Mercury Construction Corp.,
460 U.S. 1 (1983) 15

Pike v. Burlington Northern R.R. Co.,
273 Mont. 390, 903 P.2d 1352 (1995) 5, 6, 7

Polk County Secondary Roads v. Iowa Civil Rights Comm'n,
468 N.W.2d 811 (Iowa 1991) 5

Puchert v. Agsalud,
67 Haw. 25, 677 P.2d 449 (Hawaii 1984) 5

Ryherd v. General Cable Co.,
124 Ill. 2d 418, 530 N.E.2d 431 (1988) 5, 6

Southland Corp. v. Keating,
465 U.S. 1 (1984) 15

Torrez v. Consolidated Freightways Corp.,
58 Cal. App. 4th 1247, 68 Cal. Rptr. 2d 792 (1997) 6

United Paperworkers Int'l Union v. Misco, Inc.,
484 U.S. 29 (1987) 11

Vaughn v. Pacific N.W. Bell Tel. Co.,
289 Or. 73, 611 P.2d 281 (1980) 5, 8

Wilko v. Swan,
346 U.S. 427 (1953) 11

Winston v. Maine Technical College Sys.,
631 A.2d 70 (Me. 1993), *cert. denied,*
511 U.S. 1069 (1994) 5, 6

Wright v. Universal Maritime Serv. Corp.,
121 F.3d 702 (4th Cir. 1997) . . . . passim

Youghiogheny & Ohio Coal Co. v. Oszust,
23 Ohio St. 3d 39, 491 N.E.2d 298 (1986) 5, 7, 8

Statutes and Regulations.

9 U.S.C. § 10 (1994) 11

29 U.S.C. § 173(d) (1994) 13

42 U.S.C. § 1981 (1994) 17

42 U.S.C. § 2000e-5(c) (1994) 10

42 U.S.C. § 2000e-5(d) (1994) 10, 16

42 U.S.C. § 2000e-7 (1994) 10

42 U.S.C. §§ 12101-12213 (1994) 2

42 U.S.C. § 12117 (1994) 2, 16

Civil Rights Act of 1991
Pub. L. No. 102-166, § 118, 105 Stat. 1071,
1081 (1991) 16, 17, 18, 19

29 C.F.R. §§ 1601.27, 1601.28 (1997) 10

Conn. Gen. Stats, § 31-51bb (1997) 9

Mass. Gen. Law Ch. 150E, § 8 (1996) .8

Mass. Gen. Law Ch. 151B, § 3(6) (1996) 1

Miscellaneous.

137 Cong. Rec. H9505-01, H9548 (Nov. 7, 1991) 1

137 Cong. Rec. H9595-01, H9530 (Nov. 7, 1991) 1

137 Cong. Rec. S15472, S15478 (daily ed. Oct. 30, 1991)
(statement of Sen. Dole) 1

H.R. Rep. No. 102-40(I) (1991) 17, 1

H.R. Rep. No. 102-40(II) (1991) 17, 1

Equal Employment Opportunity Commission,
Enforcement Guidance--Mandatory Arbitration,
Number 915.002 (1997)
Employment Pracs. (CCH) ¶ 5433, at 617 . . . . 9, 1

Owen Fiss, *Out of Eden*,
94 Yale L.J. 1669 (1985) 1

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997
No. 97-889

CAESAR WRIGHT, *Petitioner*

v.

UNIVERSAL MARITIME SERVICE CORP.; STEVENS SHIPPING & TERMINAL COMPANY; STEVEDORING SERVICES OF AMERICA; RYAN-WALSH INC.; and SOUTH CAROLINA STEVEDORES ASSOCIATION, *Respondents*.

STATEMENT OF AMICUS INTEREST

The Commonwealth of Massachusetts, the States of Arizona and West Virginia and the undersigned 10 amici states have a direct interest in the resolution of this case. Many of the amici states, either by judicial order or through legislation, have expressed their strong public policy-based opposition to enforcement of mandatory arbitration clauses contained in collective bargaining agreements where individual statutory rights (as opposed to collective rights) are at issue. The States have a strong public interest in providing a public forum to citizens for the consideration of claims involving important statutory rights, particularly in the area of employment discrimination. The absence of a public judicial forum impairs deterrence, the establishment of norms of workplace conduct, and the ability to identify systemic discrimination. Mandatory arbitration also undermines the function of State fair employment agencies charged with enforcement of State anti-discrimination laws, which are bypassed when mandatory arbitration is imposed.

STATEMENT OF FACTS

This is a private action alleging disability discrimination. Petitioner Wright was a longshoreman who allegedly was denied employment with Respondent because he suffered and had been compensated for a work-related injury. After he was refused employment, Wright notified his union president of the refusal. The president complained to Respondent that his refusal constituted a violation of the Americans with Disability Act ("ADA"), 42 U.S.C. §12101-12213 (1994), and a violation of the union contract, but he did not file a grievance on Wright's behalf and allowed the period for filing it to lapse. Instead, the union advised Wright to file a charge with the Equal Employment Opportunity Commission ("EEOC") and to seek private legal counsel. When Wright subsequently filed a complaint based upon his charge, that complaint was dismissed because he failed to utilize the mandatory arbitration procedures established under the collective bargaining agreement ("CBA"). That decision was affirmed by the Fourth Circuit in an unpublished decision, *Wright v. Universal Maritime Service Corporation,* dated July 29, 1997, on the ground that *Gilmer v. Interstate/Johnson Lane Corporation*, 500 U.S. 20 (1991), mandates the use of arbitration in this situation.

SUMMARY OF ARGUMENT

The Fourth Circuit's decision, if affirmed, would conflict with many States' important interest, reflected in judicial decisions and legislation, in guaranteeing a public forum to citizens who are subject to collective bargaining agreements for consideration of state and federal statutory rights that adhere to them as individuals rather than as collective members of a union.

Affirming the Fourth Circuit's decision in *Wright* to enforce mandatory arbitration clauses in collective bargaining agreements for resolution of important statutory rights in the area of employer/employee relations could conflict with this Court's traditional deference under the Labor Management Relations Act, 29 U.S.C. §§141-188 (1994), to the right of States to determine whether to provide a public forum for state statutory claims.

The Fourth Circuit erred when it applied *Gilmer* in this case to enforce a mandatory arbitration clause, because the legislative history of the ADA indicates a clear intent to preclude mandatory arbitration of discrimination claims.

ARGUMENT

I. THE STATES HAVE AN IMPORTANT INTEREST IN ENSURING THAT THEIR CITIZENS WHO ARE SUBJECT TO COLLECTIVE BARGAINING AGREEMENTS HAVE ACCESS TO COURTS IN ORDER TO VINDICATE EMPLOYMENT RIGHTS THAT DERIVE FROM STATE AND FEDERAL STATUTES.

A. *The Rationale of State Courts for Refusing to Enforce Mandatory Arbitration Agreements is the Distinctive Context of Collective Bargaining.*[1]

If the Court affirms the *Wright* decision and requires that mandatory arbitration clauses contained in collective bargaining agreements be enforced to bar a judicial forum for resolution of rights under state and federal statutes, it will contravene the strong public interest of the States otherwise, as expressed in case law and legislation. Many State courts, for example, either refuse entirely to recognize arbitration clauses under collective bargaining agreements as establishing the exclusive means for resolving individual statutory rights for employees, or refuse to give arbitral decisions preclusive effect. *See Blanchette v. School Committee of Westwood*, 427 Mass. 176, 183, -- N.E.2d -- (1998) (employee who arbitrated her state discrimination claim under a mandatory arbitration clause of a CBA not barred from pursuing claim in a judicial forum); *accord, Puchert v. Agsalud*, 67 Haw. 25, 677 P.2d 449, 455-56 (1984) (holding that employee could pursue statutory wrongful discharge claim in court and not through arbitration as required by CBA); *Polk County Secondary Roads v. Iowa Civil Rights Comm'n,* 468 N.W.2d 811, 817 (Iowa 1991) (same); *Winston v. Maine Technical College Sys.*, 631 A.2d 70, 73 (Me. 1993), *cert. denied,* 511 U.S. 1069 (1994) (same); *Pike v. Burlington Northern R. Co.*, 273 Mont. 390, 903 P.2d 1352 (1995) (same); *Vaughn v. Pacific N.W. Bell Tel. Co.*, 289 Or. 73, 87, 611 P.2d 281, 290 (1980) (same); *Ryherd v. General Cable Co.*, 124 Ill. 2d 418, 427-29, 530 N.E.2d 431, 435-37 (1988) (employee not barred by mandatory arbitration clause from pursuing action for retaliatory discharge under state workers' compensation laws); *see also Commission of Labor v. Talbert Mfg. Co.*, 593 N.E.2d 1229, 1233 (Ind. App. 1992) (holding that IOSHA claims were not subject to mandatory arbitration clause of a CBA); *Youghiogheny & Ohio Coal Co. v. Oszust,* 23 Ohio St. 3d 39, 41, 491 N.E.2d 298, 300 (1986) (employee not barred by arbitration provision from bringing action under unemployment compensation laws).

The reason for refusing to enforce mandatory arbitration arises partly from the distinctive nature of the collective bargaining context. State courts have recognized, for example, that an employee, merely by being a member of a union that is covered by a CBA with a mandatory arbitration clause, does not waive his or her right to a judicial forum for consideration of a statutory claim that is personal to the employee, as opposed to collective in nature (like the right to strike) and subject to bargaining. *See Blanchette,* 427 Mass. at 183, -- N.E.2d -- ("Although a union has the power to waive statutory rights related to collective activity, rights of the kind protected by [the Massachusetts' anti-discrimination statute], which are of a personal, and not merely economic, nature are beyond the union's ability to bargain away"); *accord Winston,* 631 A.2d at 73. ("By merely joining a union . . . without specifically contracting to arbitrate statutory employment discrimination claims, an employee is not precluded from asserting such claims in litigation."); *Pike*, 903 P.2d at 1354 (stating that state and federal rights to be free from unlawful sex discrimination "cannot be bargained away as part of a collective bargaining agreement"); *see also Francini v. Pheonix Newspapers, Inc.*, 188 Ariz. 576, 937 P.2d 1382, 1388-89 (Ariz. App. 1996); *Torrez v. Consolidated Freightways Corp.*, 58 Cal. App. 4th 1247, 1258, 68 Cal. Rptr. 2d 792, 799 (1997) (arguing that only "common, contractual rights of the members" can be bargained away); *Ryherd,* 124 Ill. 2d at 426, 530 N.E.2d at 435 (stating that the right to recover for retaliatory discharge is "derived from Illinois public policy" and "[i]t cannot be negotiated or bargained away").

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[1] The amici states support the use of alternative dispute resolution procedures when there is a present dispute or claim and when the parties voluntarily and knowingly agree to resolve a dispute through arbitration.

Moreover, State courts have recognized that under most CBAs, the individual employee does not control the advancement of his or her grievance and is dependent on the decision of the union to bring a matter to arbitration, and thereafter to appeal the matter if it is resolved unfavorably. Under these circumstances, the union may reasonably and properly refuse to arbitrate a particular matter, or if it does decide to go forward, arbitrate it with less vigor than likely

would be the case if the employee were pursuing the matter in a State fair employment practices agency or in court. As one State court has noted, "reliance on an employee's union to vindicate adequately the employee's statutory rights may not be justified." *Genovese v. Gallo Wine Merchants Inc.*, 226 Conn. 475, 488, 628 A.2d 946, 952 (1993). In fact, "[b]ecause a union's objective may be to maximize the rights and benefits of its members as a whole, rather than to achieve the best possible outcome for an individual employee in a particular case, a union weighing individual and collective interests might validly allow some employee's statutory rights to be sacrificed." *Id.; see also Youghiogheny & Ohio Coal Co.*, 23 Ohio St. 3d at 44, 491 N.E.2d at 302 (Wright, J., concurring).[2] If the union decides not to pursue an individual case, that in no way implies that the union opposes prosecution of the case by its member. As the present case demonstrates, the opposite is most likely to be true.

State courts have also reasoned that an inherent "tension" exists between contractual and statutory rights when an arbitrator is called upon to decide a statutory matter. *Pike*, 903 P.2d at 1357. The arbitrator's source of authority is the CBA "and his task is to effectuate the intent of the parties . . . by interpreting the agreement in accordance with the law of the shop and the various needs of the employer and the union, rather than in accordance with the law of the land." *Id.*

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[2] This Court similarly has recognized that "even if the employee's claim were meritorious, his union might, without breaching its duty of fair representation, reasonably and in good faith decide not to support the claim vigorously." *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 742 (1981).

Moreover, an arbitrator may not take into consideration "the full range of 'public law' and public policy considerations" necessary for an appropriate decision on an individual claim that statutory rights were violated, because his or her "power is both derived from, and limited by, the collective bargaining agreement and the submission of the parties." *Genovese*, 226 Conn. at 486, 628 A.2d at 952; *see also Vaughn*, 289 Or. at 86, 611 P.2d at 289. [3]

B. *The Refusal to Enforce Mandatory Arbitration Agreements Is Also Based on the States' Strong Public Interest in Providing a Public Forum for Vindication of Statutory Rights.*

States have concluded that it is good public policy to make a judicial forum available for vindication of important statutory rights under various statutes that govern the employment relationship, including the anti-discrimination statutes,

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[3] Indeed, some states statutorily limit an arbitrator to deciding issues related to the interpretation or application of the CBA only, thereby altogether depriving the arbitrator of the power to decide statutory claims. *See Blanchette*, 427 Mass. at 180 (declaring this the effect of Mass. Gen. Law Ch. 150E, § 8 (1996), which provides that a written agreement for binding arbitration in a CBA can "be invoked in the event of any dispute concerning the *interpretation or application* of such written agreement" (emphasis added)); *cf. Youghiogheny & Ohio Coal Co.*, 23 Ohio St. 3d at 41, 491 N.E.2d at 300 (holding that an "arbitrator simply has no authority to invoke this state's unemployment compensation laws in reaching a decision").

regardless of the CBA.[4] The preference for a public forum (as opposed to a private arbitral setting) serves the public interest in a number of important ways. First, public hearings provide education and information to the community as a whole concerning legal and illegal workplace conduct. In addition, rulings by the courts establish precedent. "[T]he courts give valuable guidance to persons and entities covered by the laws regarding their rights and responsibilities, enhancing voluntary compliance with the laws." Equal Employment Opportunity Commission, *Enforcement Guidance--Mandatory Arbitration*, Number 915.002 (1997) Employment Pracs. (CCH) ¶5433, at 6173 ("EEOC Enforcement Guidance"). Forcing private mandatory arbitration of discrimination claims for employees subject to CBAs disserves the public by denying an open and fully-developed hearing process.

This function of public judicial decisions applies equally to decisions from State fair employment agencies and is particularly important when the State agency holds public hearings at which evidence is presented and issues written decisions that contain factual determinations and legal rulings.

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[4] Some states have enacted legislation which codifies this right. *See, e.g.*, Conn. Gen. Stat. § 31-51bb (1997) (providing that "[n]o employee shall be denied the right to pursue, in a court of competent jurisdiction, a cause of action arising under the state or federal constitution or under a state statute solely because the employee is covered by a collective bargaining agreement").

See Mass. Gen. Law Ch. 151B, § 3(6) (1996).[5] As this Court has recognized, Congress "affirmatively endorsed state antidiscrimination remedies in Title VII of the Civil Rights Act of 1964." *Lingle v. Norge Div. of Magic Chef, Inc.* 486 U.S. 399, 412 (1987) (citing 42 U.S.C. §§ 2000e-5(c), 2000e-7). Moreover, Congress has recognized the right of the States, under the federal fair employment laws, to have the first opportunity to investigate and prosecute state law discrimination claims. 42 U.S.C. § 2000e-5(d) (1994). Mandatory arbitration of discrimination claims, however, bypasses the State fair employment agencies, as well as the courts.[6]

Moreover, enforced arbitration restricts the flow of information to State fair employment agencies, damaging their ability to monitor, investigate and enforce discrimination rights within their states for employees subject to CBAs. It also renders it impossible for them to identify industry-wide problems or systemic forms of discrimination in the workplace of employees subject to CBAs. Arbitral resolution of these cases "may, in fact, protect systemic discriminators by forcing claims to be adjudicated one at a time, in isolation, without reference to a broader -- and more accurate -- view of the employers' conduct." EEOC Enforcement Guidance, *supra*, at 6175.[7]

Second, the judicial forum provides important safeguards to assure that a decision is rendered which takes into account the public policy behind a particular statute and the interests it was meant to protect. In the private arbitral setting, however, the focus is on the language of the contract and the smooth functioning of the workplace. As one commentator has noted, "[a]djudication is more likely to do justice than . . . arbitration . . . precisely because it vests the power of the state in officials who act as trustees for the public, who are highly visible, and who are committed to reason." Owen Fiss, *Out of Eden*, 94 Yale L.J. 1669, 1673 (1985); *see also Lepore v. National Tool and Mfg. Co.*, 224 N.J. Super 463, 472, 540 A.2d 1296, 1300 (1988) (stating that "an arbitrator ordinarily cannot consider public interest and does not determine violations of law or public policy") (citations omitted).

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[5] The EEOC procedures allow the Commission or the claimant to file a civil action after conciliation fails. 29 C.F.R. §§ 1601.27, 1601.28 (1997). It does not provide for a public hearing.

[6] This Court noted in *Gilmer* that an employee subject to a mandatory arbitration agreement could still file allegations of discrimination in the Equal Employment Opportunity Commission, even though he or she could not initiate a private judicial action. *See Gilmer*, 500 U.S. at 28. It is unclear, however, whether under a particular state law, an employee could also file in a State fair employment agency. Moreover, even if an employee could file, and assuming that he or she knew of that right, there is no incentive to do so since personal gain is unlikely -- any opportunity to obtain financial remuneration is in the arbitral forum.

[7] Moreover, review of an arbitral award by a Court is limited. EEOC Enforcement Guidance, *supra*, at 6174 ("[T]here is virtually no opportunity for meaningful scrutiny of arbitral decision-making"). The Federal Arbitration Act ("FAA") provides that arbitral awards can be vacated only for procedural reasons, such as fraud, corruption or misconduct. 9 U.S.C. §10 (1994). This Court has held that an arbitral award can be vacated where it is in "manifest disregard" of the law, *Wilko v. Swan,* 346 U.S. 427, 436-37 (1953), or violates public policy that is explicit, well-defined, "dominant" and ascertainable from the law, *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 43 (1987), both of which are difficult standards to meet.

Finally, the arbitrator is limited in his or her ability to fashion an appropriate remedy for discrimination, and is unable to award the kind of relief that may be imposed by a court or the State fair employment agencies to address systemic problems in the workplace. An agency or a court, for example, can require and enforce company-wide equitable and injunctive relief that has an effect beyond the grievant. Moreover, courts and agencies can impose affirmative obligations on the employer, such as performing diversity training and promulgating zero tolerance policies. An arbitrator, however, is limited to the powers set forth in the four corners of the contract.[8]

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[8] This Court, in a long line of cases, also has repeatedly rejected the view that a decision in an arbitration proceeding brought under a CBA bars a subsequent suit in federal court under a federal statute, when that statute creates an individual right. *See McDonald v. City of West Branch*, 466 U.S. 284, 292 (1984); *Barrentine v. Arkansas-Best Freight Says., Inc.*, 450 U.S. 728, 744 (1981); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 (1974). The rationale for these cases is based on the distinctive nature of the CBA context. *Livadas v. Bradshaw*, 512 U.S. 107, 127 n.21 (citing *Gilmer*, 500 U.S. at 33-34). The Fourth Circuit in *Wright* ignored this line of cases

C. Decisions under the Labor Management Relations Act Recognizing the Right of States to Provide a Judicial Forum to Employees Subject to Collective Bargaining Agreements for Resolution of Independent State Statutory Rights Support the Conclusion that the Fourth Circuit's Decision in Wright Should be Reversed.

The Labor Management Relations Act of 1947 ("LMRA" or "the Act"), 29 U.S.C. §173(d) (1994), which applies to collective bargaining agreements, grants federal (and state) courts jurisdiction over claims asserting breach of CBAs, and also authorizes the development of federal common law rules of decision "in large part to assure that agreements to arbitrate grievances would be enforced, regardless of the vagaries of state law and lingering hostility toward extrajudicial dispute resolution." *Livadas v. Bradshaw*, 512 U.S. 107, 121-22 (1994).

This Court, however, has specifically limited the pre-emptive reach of the LMRA to avoid intrusion on the traditional powers of the States to legislate in the area of employer/employee relations, including the ability of States to provide a judicial forum for consideration of state law claims. *See Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 212 (1985) ("It would be inconsistent with congressional intent under [the

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and the concomitant rationale when it denied a judicial forum to an employee covered by a CBA who asserted a claim under the ADA. *Wright v. Universal Maritime Service Corp.*, 121 F.3d 702 (1997).

LMRA] to pre-empt state rules that proscribe conduct, or establish rights and obligations, independent of the labor contract."); *accord Hawaiian Airlines, Inc. v. Norris,* 512 U.S. 246, 252 (1994) (noting that employment standards are "within the traditional police power of the State") (quoting *Fort Halifax Packing Co. v. Coyne,* 482 U.S. 1, 21 (1987) (internal quotation marks omitted)); *see also Metropolitan Life Ins. Co. v. Massachusetts,* 471 U.S. 724, 756 (1984) ("States possess the broad authority under their police powers to regulate the employment relationship to protect workers within the State") (quoting *De Canas v. Bica,* 424 U.S. 351, 356 (1976) (internal quotation marks omitted)).

Under the LMRA, mandatory arbitration clauses must be enforced for matters involving the interpretation of a CBA but a public forum is available for matters involving independent state and federal statutory rights of employees. *See Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 413 (1988) (an employee covered by a CBA with a mandatory arbitration clause was held not barred from pursuing her retaliatory discharge action under Illinois workers' compensation laws in Illinois state court); *Livadas*, 512 U.S. at 124-25 (employee subject to a CBA containing an agreement to arbitrate was not prevented by Section 301 of the LMRA from maintaining her state law claim for late payment of wages owed upon discharge); *see also Hawaiian Airlines,* 512 U.S. at 260 (state law cause of action of CBA-covered employee under whistle blower statute is not pre-empted by the Railway Labor Act, where its pre-emption standard is "virtually identical" to Section 301 of the LMRA).

If the Fourth Circuit's decision in *Wright* denying a judicial forum to a CBA-covered employee asserting an independent federal statutory claim is upheld, courts will soon be asked to enforce mandatory arbitration of state statutory claims as well.[9] This would conflict with this Court's decisions in *Lingle* and its progeny, and should not be the result. To the contrary, this Court has recognized that the States have a substantial interest in providing a judicial forum for employees subject to CBAs to vindicate state statutory rights. *See Lingle,* 486 U.S. at 412

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[9] The Fourth Circuit's unpublished decision in *Wright* -- which required mandatory arbitration of an ADA claim -- was based on its earlier decision in *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir. 1996), which relied on the "'well-recognized policy of federal labor law favoring arbitration of labor disputes.'" *Id.* at 875 (quoting *Adkins v. Times-World Corp.*, 771 F.2d 829, 831 (4th Cir. 1985), *cert. denied,* 474 U.S. 1109 (1986)); *see also Gilmer,* 500 U.S. at 25 (noting "liberal federal policy favoring arbitration agreements") (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)) (internal quotation marks omitted). While application of this policy to require arbitration of state statutory claims would directly conflict with the *Lingle* line of cases, courts will nonetheless be asked to extend its reach to such claims. *See e.g. Allied-Bruce Terminix Cos. v. Dobson,* 513 U.S. 265, 282 (1995) (holding that Alabama's statute, which rendered pre-dispute arbitration agreements in consumer protection cases unenforceable, was pre-empted by Section 2 of the FAA); *Southland Corp. v. Keating*, 465 U.S. 1, 15-16 (1984) (holding that California Franchise Investment Law, which invalidates certain arbitration agreements, was pre-empted by Section 2).

("The establishment of labor standards falls within the traditional police power of the State.") (quoting *Fort Halifax Packing*, 482 U.S. at 21) (internal quotation marks omitted). *Wright* should be reversed.

II. ASSUMING ARGUENDO THAT THE COURT INTENDED TO OVERRULE *ALEXANDER V. GARDNER-DENVER* IN *GILMER*, THAT HOLDING WAS OVERRULED BY CONGRESS WHEN IT PASSED THE 1991 CIVIL RIGHTS ACT.

Assuming that the Fourth Circuit was correct in concluding that it was this Court's intent in *Gilmer* to compel the beneficiaries of those collective bargaining agreements which provide for mandatory arbitration to arbitrate their statutory discrimination claims, that requirement was discarded when Congress subsequently passed the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991). That Act, among other things, amended both the enforcement provisions of the federal 1964 Civil Rights Act, 42 U.S.C. § 2000e-5 (1994), and the ADA, 42 U.S.C. § 12117 (1994). The legislative history of the Act unambiguously rejected pre-dispute mandatory arbitration agreements.[10]

Section 118 of the Civil Right Act of 1991 speaks directly to the issue of the arbitrability of Title VII claims. That section encourages the use of alternative dispute resolution "where appropriate and to the extent authorized by law." Pub. L. No. 102-166, § 118, 105 Stat. 1071, 1081 (1991) (codified as a historical and statutory note to 42 U.S.C. § 1981 (1994)). The House reports on this section explicitly state that "any agreement to submit disputed issues to arbitration, whether in the context of a collective bargaining agreement or in an employment contract, does not preclude the affected person from seeking relief under the enforcement provisions of Title VII." H.R. Rep. No. 102-40(I) at 97 (1991), H.R. Rep. No. 102-40(II) at 41 (1991). They went on to explain that, consistent with this Court's decision in *Alexander v. Gardner-Denver*, the encouragement of alternate dispute resolution in the Act was intended to "supplement, not supplant" existing remedies otherwise available in the statutory enforcement scheme. *Id.* Speaking to proposed section 118, then-Senate Minority leader Robert Dole noted that the section encouraged arbitration only "where the parties knowingly and voluntarily elect to use these matters." 137 Cong. Rec. S15472, S15478 (daily ed. Oct. 30, 1991) (statement of Sen. Dole).

Congress further underscored its support of *Alexander v. Gardner-Denver* by rejecting a proposed amendment which would have implicitly endorsed mandatory arbitration agreements by encouraging the use of arbitration "in place of judicial resolution." The Education and Labor committee explained that such agreements would have allowed employers to "refuse to hire workers unless they signed a binding statement waiving all rights to file Title VII complaints" and that this "would fly in the face of Supreme Court decisions holding that workers have the right to go to court, rather than being forced into compulsory arbitration, to resolve important statutory and constitutional rights . . . ." H.R. Rep. No. 102-40(I) at 104 (1991). The committee concluded that "American workers should not be forced to choose between their jobs and their civil rights." *Id.*

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[10] Although the legislative history of the Civil Rights Act of 1991 refers explicitly to Title VII, Congress specifically imported the enforcement scheme of Title VII into the ADA, making these amendments equally applicable there. See 42 U.S.C. § 12117 (1994).

Although the greater part of the legislative debate involving the 1991 Civil Rights Act occurred prior to *Gilmer*, the final debate over the bill occurred after the decision and immediately prior to the Act's passage on November 7, 1991. During that debate, the chair of the House Committee on Education and Labor reiterated that Section 118 was "intended to be consistent with . . . *Alexander v. Gardner-Denver,"* and added:

> This section contemplates the use of voluntary arbitration to resolve specific disputes after they have arisen, not coercive attempts to forego statutory rights. No approval whatsoever is intended of the Supreme Court's recent decision in *Gilmer*.... or any application or extension of it to Title VII.

137 Cong. Rec. H9595-01, H9530 (Nov. 7, 1991). Only Representative Henry Hyde, who had urged that the bill not be passed, H.R. Rep. No. 102-40(II) at 80 (1991), contended that section 118 permitted binding arbitration, 137 Cong. Rec. H9505-01, H9548 (Nov. 7, 1991), and conceded that binding arbitration could occur only "where the parties knowingly and voluntarily elect to use these methods." *Id.*

Aside from the legislative history of the Act, the language of the amendments clearly indicates that Congress did not intend to compel the use of binding alternative dispute resolution mechanisms, or to permit agreements to use alternative dispute resolution to be entered into before a dispute arose. For example, Section 118 of the Act speaks of settlement negotiations, conciliation, facilitation, mediation, fact-finding and mini-trials, not of binding arbitration. See Civil Right Act of 1991, Pub. L. No. 102-166, § 118, 105 Stat. 1071, 1081 (1991). Title VII's goal of "encouraging voluntary settlement" is referred to several times, both in the legislative history and throughout the Act, but always in the context of the resolution of existing claims. Further, despite every opportunity to remove them, Congress retained in the new enforcement provisions an absolute right to seek relief in court when alternative dispute resolution efforts failed.

This legislative history of the 1991 Civil Rights Act serves two purposes in the context of this case. It definitively establishes Congress' intent to permit Title VII and ADA claimants to rely on *Alexander v. Gardner-Denver*, notwithstanding any subsequent contrary holding in *Gilmer*, and it establishes the clear Congressional intent necessary to overcome a presumption of arbitrability under the standards set out in *Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

For these reasons the Court should conclude that any presumption in favor of arbitrability has been overcome, that the legislative history of the ADA does not permit binding arbitration of ADA claims, and that Wright should not be denied his statutory right to a judicial forum for his claim of disability discrimination.

CONCLUSION

For the foregoing reasons, the amici states respectfully request that the Court reverse the Fourth Circuit decision in this case.

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Supreme Court of the United States

OCTOBER TERM, 1997

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CEASAR WRIGHT,

Petitioner,

—v.—

UNIVERSAL MARITIME SERVICE CORP., *et al.*,

Respondents.

ON WRIT OF *CERTIORARI* TO
THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF SOUTH CAROLINA, IN SUPPORT OF PETITIONER

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36 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI* 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 4

ARGUMENT 7

A UNION'S AGREEMENT TO PREDISPUTE ARBITRATION IN A COLLECTIVE BARGAINING AGREEMENT DOES NOT OVERRIDE THE STATUTORY RIGHT OF INDIVIDUAL EMPLOYEES TO PURSUE THEIR EMPLOYMENT DISCRIMINATION CLAIMS IN FEDERAL COURT 7

A. The Decision To Arbitrate Statutory Discrimination Claims Represents A Waiver Of Important Federal Rights That Can Only Be Upheld If It Is Knowing, Intelligent, And Voluntary 7

B. A Mandatory, Predispute Arbitration Provision In A Collective Bargaining Agreement Does Not Constitute A Valid Individual Waiver Of Statutory Rights Against Employment Discrimination 10

C. The Court Below Erred In Construing *Gilmer* To Mandate Enforcement Of Arbitration Agreements That Are Not Knowing And Voluntary 15

Page

D. Contrary To The Fourth Circuit Ruling, The Legislative History Of The Americans With Disabilities Act (And Related Civil Rights Statutes) Does Not Support Mandatory Arbitration Of Statutory Claims 21

CONCLUSION 28

TABLE OF AUTHORITIES

Page

Cases

Aetna Ins. Co. v. Kennedy,
301 U.S. 389 (1937) 8

Agostini v. Felton,
521 U.S. __, 117 S.Ct. 1997 (1997) 5, 16

Alexander v. Gardner-Denver Co.,
415 U.S. 36 (1974) . . . . *passim*

Allis-Chalmers Corp. v. Lueck,
471 U.S. 202 (1985) 13

Atchison, Topeka & Santa Fe Ry. Co. v. Buell,
480 U.S. 557 (1987) 13

Austin v. Owens-Brockway Glass Container, Inc.,
78 F.3d 875 (4th Cir.),
cert. denied, __ U.S. __, 117 S.Ct. 432 (1996) 3, 21

Barrentine v. Arkansas-Best Freight System,
450 U.S. 728 (1981) 12, 13, 14

Cole v. Burns Int'l Security Services,
105 F.3d 1465 (D.C.Cir. 1997) 19

Connecticut Nat'l Bank v. Smith,
826 F.Supp. 57 (D.R.I. 1993) 8

D.H. Overmyer Co. v. Frick,
405 U.S. 174 (1972) 8

Davis v. Passman,
442 U.S. 228 (1979) 7

Page

Fuentes v. Shevin,
407 U.S. 67 (1972) 8, 19

Gilmer v. Interstate/Johnson Lane Corp.,
500 U.S. 20 (1991) . . . . *passim*

Great Am. Fed. Sav. & Loan
Ass'n v. Novotny,
442 U.S. 366 (1979) 26

Great Western Mortgage Corporation
v. Michele Peacock,
110 F.3d 222 (3d Cir.),
cert. denied, __ U.S. __, 118 S.Ct. 299 (1997) 20

Hetzel v. Prince William County, Virginia,
__ U.S. __, 118 S.Ct. 1210 (1998) 7

Holley v. Seminole County School District,
755 F.2d 1492 (11th Cir. 1985) 22

Hooters of America, Inc. v. Phillips,
1998 U.S. Dist. LEXIS 3962
(D.S.C. Mar. 12, 1998) 19

Johnson v. Zerbst,
304 U.S. 458 (1938) 7, 8

Livadas v. Bradshaw,
512 U.S. 107 (1994) 14

Luis Acosta, Inc. v. Citibank, N.A.,
920 F.Supp. 15 (D.P.R. 1996) 8

Lyght v. Ford Motor Co.,
643 F.2d 435 (6th Cir. 1981) 22

Mago v. Shearson Lehman Hutton, Inc.,
956 F.2d 932 (9th Cir. 1992) 20

Page

McCarthy v. United States,
394 U.S. 459 (1969) 8

McDonald v. City of West Branch,
466 U.S. 284 (1984) 13, 14

Mitsubishi Motors Corp. v. Soler
Chrysler-Plymouth, Inc.,
473 U.S. 614 (1985) 16

National Equipment Rental, Ltd. v. Hendrix,
565 F.2d 255 (2d Cir. 1977) 8

Nelson v. Cyprus Bagdad Copper Corp.,
119 F.3d 756 (9th Cir. 1997) 9

Nicholson v. CPC Int'l, Inc.,
877 F.2d 221 (3d Cir. 1989) 22

Ohio Bell Tel. Co. v. Public
Utilities Comm'n,
301 U.S. 292 (1937) 8

Patterson v. Tenet Healthcare, Inc.,
113 F.3d 832, 833 (8th Cir. 1997) 19

Prudential Insurance Co. of America v. Lai,
42 F.3d 1299 (9th Cir. 1994),
cert. denied, 516 U.S. 812 (1995) 9, 19

Pryner v. Tractor Supply Co.,
109 F.3d 354 (7th Cir. 1997) 27

Renteria v. Prudential Ins. Co. of America,
113 F.3d 1104 (9th Cir. 1997) 9, 19

Rodrigues de Quijas v.Shearson/
American Express, Inc.,
490 U.S. 477 (1989) 25

Page

Rosenberg v. Merrill Lynch, Pierce,
Fenner & Smith, Inc.,
1998 U.S. Dist. LEXIS 877
(D.Mass. 1998) 6, 23

Rosenfeld v. Dep't of the Army,
769 F.2d 237 (4th Cir. 1985) 22

Shearson/American Express Inc. v. McMahon,
482 U.S. 220 (1989) 20

Swenson v. Management Resources Int'l, Inc.,
858 F.2d 1304 (8th Cir. 1988) 22

Thompson v. Thompson,
484 U.S. 174 (1988) 25

Utley v. Goldman Sachs & Co.,
883 F.2d 184 (1st Cir. 1989) 22

Whirlpool Financial Corp. v. Sevaux,
866 F.Supp. 1102 (N.D. Ill. 1994) 8

Statutes and Regulations

Age Discrimination in Employment Act,
29 U.S.C. §621 *et seq.* 15

Americans with Disabilities Act,
    42 U.S.C. §12101 *et seq.* . . . . *passim*
    42 U.S.C. §12101(a)(5) 21
    42 U.S.C. §12101(b)(1)(2) 21
    42 U.S.C. §12212 . . . . 21, 22

Civil Rights and Women's Equity in
Employment Act of 1991,
Pub.L.No. 102-166, 105 Stat. 1071 (1991) . . . . *passim*

Page

Fair Labor Standards Act,
29 U.S.C. §201 *et seq.* 12

Title VII of the Civil Rights Act of 1964,
42 U.S.C. §2000e . . . . *passim*

29 U.S.C. §626(c)(1) 24

Legislative History

137 Cong.Rec. H9505-01
(November 7, 1991) 26

H.R. Rep. No. 485,
101st Cong., 2d Sess.,
reprinted in 1990 U.S.C.C.A.N. 445 23

H.R. Conf. Rep. No. 596,
101st Cong., 2d Sess.,
reprinted in 1990 U.S.C.C.A.N. 565 23

H.R. Rep. No. 40(I),
102d Cong., 1st Sess.,
reprinted in 1991 U,S.C.C.A.N. 549 . . . . 24, 25

H.R. Rep. No. 40(II),
102d Cong., 1st Sess.,
reprinted in 1991 U.S.C.C.A.N. 694 . . . . 24, 26

INTEREST OF *AMICI* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to preserving the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The ACLU of South Carolina is one of its state affiliates. Since its founding in 1920, the ACLU has vigorously supported the right of workers to organize collectively and to bargain through their union regarding the terms and conditions of employment. At the same time, the ACLU has also vigorously supported the enactment and enforcement of the major federal civil rights statutes that are designed to end discrimination in employment. Because the decision below purports to address both of these interests, it involves issues of critical importance to the ACLU and its members.

More specifically, *amici* believe that the decision below fundamentally misconceives the relationship between statutory rights -- such as the protection against discrimination on the basis of disability that is at issue in this case -- and the role of collective bargaining in the workplace. The rights and remedies provided by Congress in the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, and other similar statutes, belong to each individual worker. They are not derived from the collective bargaining agreement and cannot be altered or waived as part of the negotiation between the union and the employer. The decision to submit to mandatory arbitration is most properly understood as a waiver of the employee's statutorily conferred right to a judicial forum and trial by jury. Such waivers can and should be upheld only if they are knowing, intelligent and voluntary, and are made by the individual rightholder. *Amici*'s position in this case is therefore consistent with the position that we have taken in numerous other cases involving the asserted waiver of individual rights. It is also an approach, in our view, that would bring needed clarity to an area of the law that remains quite confused.

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

STATEMENT OF THE CASE

Ceasar Wright is a longshoreman in the Port of Charleston, South Carolina. He has worked for a number of shipping companies through the hiring hall operated by Local 1422 of the International Longshoreman's Association (ILA). In 1992, he was injured on the job and, for a time, was disabled and unable to work as a longshoreman. Mr. Wright negotiated a settlement of his workers' compensation claims in 1994.

Mr. Wright's condition eventually improved and his physician determined that he was physically able to resume work. In January 1995, he returned to the hiring hall for work assignments and successfully performed work for four of the respondent employers. Nevertheless, on January 11, 1995, the respondents agreed that they would refuse to hire Mr. Wright on the ground that his earlier workers' compensation settlement meant that he was "no longer qualified to perform longshore work of any kind." Joint Appendix, at 35a.

Mr. Wright consulted with the president of his union local. Although the union by letter protested the decision to refuse to accept Mr. Wright for work as a violation of the ADA and the collective bargaining agreement, the union did not file a grievance on Mr. Wright's behalf. Instead, the union recommended that he retain private counsel to pursue a statutory ADA claim.

Mr. Wright filed timely charges of discrimination with the Equal Employment Opportunity Commission and, after receiving a Notice of Right to Sue on each charge, filed the present action. In a motion for summary judgment, the respondents asserted that the district court could not hear Mr. Wright's claim because he had failed to invoke the grievance procedure under the ILA's collective bargaining agreement.[2] The district court dismissed the suit without prejudice for want of jurisdiction. The district court based its ruling on the Fourth Circuit's prior decision in *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir.), *cert. denied*, __ U.S. __, 117 S.Ct. 432 (1996). In *Austin*, the Fourth Circuit had ruled that an applicable labor arbitration agreement "ousts a court of jurisdiction," *id.* at 878 n.1, to hear statutory claims of discrimination brought by individual employees. The Fourth Circuit affirmed the district court's ruling in Mr. Wright's case (also on the basis of *Austin*), and Mr. Wright timely petitioned for a writ of *certiorari*.

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[2] The contract between the South Carolina Stevedores Association and the International Longshoremen's Association, Local #1422 provides: "this Agreement is intended to cover all matters affecting wages, hours, and other terms and conditions of employment . . . ." Joint Appendix, at 45a-46a. The grievance and arbitration procedure set forth in the collective bargaining agreement applies to "matters under dispute between the parties." Petition for *Certiorari*, at 5.

SUMMARY OF ARGUMENT

The issue before this Court is not whether arbitration is a useful or desirable alternative in individual civil rights cases. Depending on the nature of the claim and its value to the parties, arbitration may well be an attractive option in particular circumstances. The issue before this Court is an earlier and more fundamental one. Who has the right to make the decision whether a statutory civil rights claim *must* be arbitrated?

Contrary to the court below, *amici* believe that a decision to submit all such claims to arbitration can *only* be made by the individual employee whose rights are at issue and not by the union as part of a collective bargaining agreement. The decision to pursue arbitration is a decision to forego a judicial forum and the right to trial by jury. Such important rights can be waived but here, as elsewhere, personal rights can only be waived by the person affected. Moreover, the burden is on those asserting the waiver to establish that the waiver was knowing, intelligent, and voluntary.

In a series of important federal statutes, Congress has banned employment discrimination on the basis of race, gender, national origin and disability. The right to be free from discrimination is an individual right that belongs to each worker regardless of whether or not there is a collective bargaining agreement. Consequently, the collective bargaining agreement cannot alter or modify the right of each individual worker to pursue a federal employment discrimination claim in federal court. What Congress has granted in this regard, the union may not negotiate away. Indeed, that is precisely what this Court unanimously held in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), when it ruled that an individual employee's right to take his claim to court under Title VII of the Civil Rights Act of 1964, 42 U.S.C.

§2000e, could not be waived by his union through a mandatory arbitration agreement.

The decision below is irreconcilable with *Alexander* and must be reversed on those grounds alone. The Fourth Circuit's view that *Alexander* has been eroded by subsequent developments misstates both its own authority and the prevailing law. As the Court just recently reiterated in *Agostini v. Felton*, 521 U.S. ___, 117 S.Ct. 1997 (1997), the lower courts are bound to follow this Court's controlling precedents unless and until this Court says otherwise. Moreover, in the twenty-four years since it was written, *Alexander* has in fact been reaffirmed by this Court on six different occasions, twice cited approvingly by Congress, and faithfully applied by every other circuit to address the issues raised by this case.

The specific error committed by the Fourth Circuit is thus easily corrected. But, unfortunately, the rationale adopted by the Fourth Circuit reflects a more general confusion among the lower courts about the meaning and significance of *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). While the Fourth Circuit stands alone in construing *Gilmer* to permit a union to waive the statutory rights of its members, the view that *Gilmer* requires the courts to uphold virtually any predispute arbitration agreement signed by the individual employee is far more widespread. This broader misunderstanding of *Gilmer* lies at the heart of the Fourth Circuit's erroneous decision in this case. Accordingly, we urge this Court to use this opportunity to address the underlying confusion surrounding *Gilmer* by clearly holding that a predispute arbitration agreement will only be upheld if it represents a knowing, intelligent, and voluntary waiver by the individual employee of the right to a judicial forum and jury trial. Unlike the Fourth Circuit, we believe that *Gilmer* and *Alexander* are entirely consistent. Unlike many of the lower courts, we also believe that

Gilmer and *Alexander* can both be read in a way that is consistent with general waiver principles.

Finally, nothing in the legislative history of the ADA or the 1991 Civil Rights Act[3] even remotely suggests that general waiver principles should not apply in this context. To be sure, both acts authorize the use of arbitration and other forms of alternative dispute resolution as a voluntary supplement to judicial enforcement. For present purposes, however, it is more significant that Congress expressly rejected an amendment to the 1991 Civil Rights Act that would have encouraged arbitration "in place of judicial resolution." More generally, the legislative history of the 1991 Civil Rights Act provides clear evidence that Congress opposed "coercive attempts to force employees in advance to forego statutory rights." *See generally Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 1998 U.S. Dist. LEXIS 877 (D.Mass. 1998). Thus, contrary to the view of the court below, these congressional enactments lend further support to the proposition that any waiver of a right to a judicial forum for adjudication of statutory civil rights claims must be knowing, intelligent, and voluntary.

In short, the resolution of this case does not require the articulation of a new legal theory. Properly understood, this is a case about waiver that can be resolved by applying the Court's traditional waiver doctrine.

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[3] The Civil Rights and Women's Equity in Employment Act of 1991, Pub.L.No. 102-166, 105 Stat. 1071 (1991).

ARGUMENT

A UNION'S AGREEMENT TO PREDISPUTE ARBITRATION IN A COLLECTIVE BARGAINING AGREEMENT DOES NOT OVERRIDE THE STATUTORY RIGHT OF INDIVIDUAL EMPLOYEES TO PURSUE THEIR EMPLOYMENT DISCRIMINATION CLAIMS IN FEDERAL COURT

A. The Decision To Arbitrate Statutory Discrimination Claims Represents A Waiver Of Important Federal Rights That Can Only Be Upheld If It Is Knowing, Intelligent, And Voluntary

The right of an individual employee to bring an employment discrimination case in court, and have any damages claim resolved by a jury, has both statutory and constitutional dimensions. The plaintiff's cause of action obviously derives from statute,[4] but the right to have that claim adjudicated pursuant to fair procedures and to have a jury find the relevant facts is rooted in the Constitution. *See Hetzel v. Prince William County, Virginia*, ___ U.S. ___, 118 S.Ct. 1210 (1998)(plaintiff has Seventh Amendment right to jury trial for her Title VII claim).

These rights can, of course, be waived. But in comparable settings, the Court has repeatedly stressed that a valid waiver must rest on "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 463 (1938). Although the generally accepted standard of knowing, intelligent, and voluntary waivers was originally developed in the context of criminal proceedings, *see, e.g.*, *id.* (waiver of right to counsel in criminal proceeding); *McCarthy v. United States*, 394 U.S. 459 (1969)(waiver of right to jury in criminal trial must be knowing and voluntary), this Court has consistently applied the same test to the waiver of fundamental rights in civil proceedings. *See Fuentes v. Shevin*, 407 U.S. 67, 94-95 (1972)(finding no waiver of procedural due process right to predeprivation hearing); *D.H. Overmyer Co. v. Frick*, 405 U.S. 174, 187 (1972)(contractual waiver of due process rights must be "voluntarily, intelligently, and knowingly" made). In the civil arena, just as in the criminal, courts "'do not presume acquiescence in the loss of fundamental rights,' . . . [and] 'indulge every reasonable presumption against waiver.'" *Fuentes*, 407 U.S. at 94, n.31 (quoting *Ohio Bell Tel. Co. v. Public Utilities Comm'n*, 301 U.S. 292, 307 (1937), and *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937)).[5]

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[4] If the plaintiff is a government employee, the right to be free from employment discrimination will also have a constitutional dimension under the Fifth and/or Fourteenth Amendments. *See, e.g., Davis v. Passman*, 442 U.S. 228, 236 (1979).

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[5] Of particular relevance to this case, a number of lower courts have expressly applied the knowing, intelligent, and voluntary standard to purported waivers of the right to jury trial in private contractual agreements. *See National Equipment Rental, Ltd. v. Hendrix*, 565 F.2d 255 (2d Cir. 1977)(provision of "equipment lease" agreement whereby lessee waived trial by jury did not constitute knowing and intentional waiver where it was buried in eleventh paragraph of fine print, 16-clause agreement); *Luis Acosta, Inc. v. Citibank, N.A.*, 920 F.Supp. 15 (D.P.R. 1996)(jury waiver clause in bank customer's factor's lien agreement was not knowing and voluntary where waiver clause was not prominently set forth but buried at end of contract and no evidence was presented that waiver provision was specifically negotiated between parties); *Whirlpool Financial Corp. v. Sevaux*, 866 F.Supp. 1102 (N.D. Ill. 1994)(promisor's alleged waiver of right to jury trial in promissory note was not knowing and voluntary where, *inter alia*, terms of note were drafted by promisee's counsel, parties never discussed waiver provision in note, provision was not so conspicuous as to insure knowing and voluntary waiver, and promisor was not represented by counsel with regard to execution of note); *Connecticut Nat'l Bank v. Smith*, 826 F.Supp. 57 (D.R.I. 1993).

(continued...)

Therefore, the burden is on the party seeking to assert a waiver of rights to establish that the waiver was knowing, intelligent, and voluntary.

Amici submit that precisely the same knowing, intelligent, and voluntary standard should apply to purported predispute waivers of the right to a judicial forum for individual statutory employment discrimination claims. Yet, with the partial exception of the Ninth Circuit, the lower courts have consistently failed to test purported arbitration agreements against this well-established standard.[6] Application of the waiver standard would not only resolve the instant case, but would provide much needed guidance to the lower courts.[7]

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[5] (...continued)
If a contractual waiver of a right to trial by jury is only valid when knowingly, intelligently, and voluntarily made then, *a fortiori*, a mandatory predispute arbitration provision must be subject to the same standards because it constitutes a waiver not only of the injured employee's right to trial by jury, but also of the right to a judicial forum at all.

[6] Even the Ninth Circuit's reliance on the waiver doctrine has been limited. In a series of recent cases, the circuit has simply held that an employee must, at the very least, know that a contractual arbitration provision applies to statutory claims in order for the court to enforce the provision as a waiver of the right to a judicial forum. *See Prudential Insurance Co. of America v. Lai*, 42 F.3d 1299 (9th Cir. 1994), *cert. denied*, 516 U.S. 812 (1995); *Renteria v. Prudential Ins. Co. of America*, 113 F.3d 1104 (9th Cir. 1997); *Nelson v. Cyprus Bagdad Copper Corp.*, 119 F.3d 756 (9th Cir. 1997).

[7] Without a meaningful waiver standard, courts will be obliged continually to police the particular arbitration procedures imposed by thousands of different employment contracts in order, in each case, to determine whether the procedures employed provide sufficient due process protections to the individual employee to further the national policies embodied in the applicable substantive statute. By refusing to enforce purported arbitration provisions unless it can be demonstrated to the court's

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B. A Mandatory, Predispute Arbitration Provision In A Collective Bargaining Agreement Does Not Constitute A Valid Individual Waiver Of Statutory Rights Against Employment Discrimination

This Court's decision in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, and its progeny, can best be understood as a particularized application of the requirement that a valid waiver of the right to a judicial forum for the adjudication of a statutory civil rights claim must be knowing, intelligent, and voluntary. Collective bargaining agreements are negotiated between employers and unions, not individual employees. Our national labor policy authorizes unions to act on behalf of employees in furtherance of their collective interests, and generally requires employees to defer to the judgment of the majority of the union's members. However, as this Court recognized in *Alexander*, that general rule does not apply when Congress provides individual workers with statutory protection against employment discrimination. Unions are not free to negotiate away these statutory rights because the right belongs to the individual employee. Many collective bargaining agreements contain mandatory arbitration provisions, and those provisions are legally unobjectionable if they are limited to disputes arising from the collective bargaining agreement itself. But the union has no authority, in the collective bargaining agreement or elsewhere, to waive the right of individual employees to pursue their statutory civil rights claims in court. Any purported waiver contained in the collective bargaining agreement cannot be attributed to an individual employee who did not, in fact, knowingly and voluntarily agree to it.

The principle that a union cannot waive an individual employee's statutory rights against employment discrimination was clearly central to the Court's ruling in *Alexander*. The unanimous opinion by Justice Powell stressed precisely this point in explaining the relationship between Title VII and the collective bargaining agreement:

> To begin, we think it clear that there can be no prospective waiver [through a collective bargaining agreement] of an employee's rights under Title VII. It is true, of course, that a union may waive certain statutory rights related to collective activity, such as the right to strike. These rights are conferred on employees collectively to foster the processes of collective bargaining and properly may be exercised or relinquished by the union as collective-bargaining agent to obtain economic benefits for union members. Title VII, on the other hand, stands on plainly different ground; it concerns not majoritarian processes, but an individual's right to equal employment opportunities. Title VII's strictures are absolute and represent a congressional command that each employee be free from discriminatory practices. Of necessity, the rights conferred can form no part of the collective-bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII. In these circumstances, an employee's rights under Title VII are not susceptible of prospective waiver.

415 U.S. at 51 (citations omitted).

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[7] (...continued)
satisfaction that an individual employee waived his right to a judicial forum voluntarily, and with full knowledge of the implications of that decision, courts can avoid the necessity of embroiling themselves in the myriad variety of private arbitration agreements currently extant.

Several years later, the Court reiterated the same principle in *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728 (1981). The dispute there involved the application of the Fair Labor Standards Act, 29 U.S.C. §201 *et seq.* Once again, the Court held that the individual employee could not be precluded from raising his claim in court, notwithstanding the existence of an arbitration provision in the collective bargaining agreement:

> Two aspects of national labor policy are in tension in this case. The first, reflected in statutes governing relationships between employers and unions, encourages the negotiation of terms and conditions of employment through the collective bargaining process. The second, reflected in statutes governing relationships between employers and their individual employees, guarantees covered employees specific substantive rights. A tension arises between these policies when the parties to a collective bargaining agreement make an employee's entitlement to substantive statutory rights subject to contractual dispute-resolution procedures . . . .

450 U.S. at 734-35. Elaborating on this "tension," the Court explained:

> Not all disputes between an employee and his employer are suited for binding resolution in accordance with the procedures established by collective bargaining. While courts should defer to an arbitral decision where the employee's claim is based on rights arising out of the collective-bargaining agreement, different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers . . . .

Id. at 737. Ultimately, the Court concluded:

> [The] rights petitioners seek to assert in this action are independent of the collective-bargaining process. They devolve on petitioners as individual workers, not as members of a collective organization. They are not waivable.

Id. at 745.

Underlying the Court's holding in *Barrentine* was the recognition that "the FLSA was designed to give specific minimum protections to *individual* workers and to ensure that *each* employee covered by the Act would receive '[a] fair day's pay for a fair day's work[.]'" *Id.* at 739 (emphasis in original)(internal citation omitted). The significance of the Court's highlighting is clear. Because individual employees are not parties to the collective bargaining agreement, the collective bargaining agreement does not (and cannot) waive the individual's right to litigate statutory claims in court.

In an unbroken line of rulings over the past two decades, this Court has reaffirmed the rulings in *Alexander* and *Barrentine*, extended their reasoning to cover all individual employee protective statutes, and reiterated this essential rationale. *See McDonald v. City of West Branch*, 466 U.S. 284 (1984)(applying *Alexander* and *Barrentine* to causes of action under 42 U.S.C. §1983); *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 213 n.8 (1985)(*Alexander* distinguished between National Labor Relations Act rights, conferred on employees collectively, "which could be waived by contract between the parties" and "an individual's substantive right derived from an independent body of law that could not be avoided by a contractual agreement"); *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 564 (1987)("This Court has, on numerous occasions, declined to hold that individual employees are, because of the availability of arbitration, barred from bringing claims under federal statutes . . . . [T]he theory running through [*Alexander*, *Barrentine*, and *McDonald*] is that notwithstanding the strong policies encouraging arbitration, 'different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers'")(internal citation omitted); *Gilmer*, 500 U.S. at 35 (reaffirming *Alexander*, *Barrentine*, and *McDonald* and noting that an "important concern" in those cases "was the tension between collective representation and individual statutory rights"); *Livadas v. Bradshaw*, 512 U.S. 107, 128 n.21 (1994)(noting that one important distinction between *Gilmer* and *Alexander* was the concern in *Alexander* that "in collective-bargaining arbitration, 'the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit'")(internal citation omitted).[8]

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[8] A secondary concern running through these decisions arises from the fact that, under most collective bargaining agreements, a decision whether to pursue a grievance to arbitration rests with the union, rather than the injured employee. Therefore, unlike the situation in *Gilmer*, there is no assurance that the employee's case will ever be heard by an arbitrator. *Cf. Alexander*, 415 U.S. at 58 n.19 ("A further concern is the union's exclusive control over the manner and extent to which an individual grievance is presented"); *Barrentine*, 450 U.S. at 742 ("Even if the employee's claim were meritorious, his union might, without breaching its duty of fair representation, reasonably and in good faith decide not to support the claim vigorously in arbitration"); *McDonald*, 466 U.S. at 291 ("The union's interests and those of the individual employee are not always identical or even compatible"). Discrimination claims are particularly likely to present a conflict between the interests of the injured employee and the union membership as a whole because remedies for the employee may be perceived to come at the expense of other employees. *Cf. Alexander*, 415 U.S. at 58 n.19 ("harmony of interest . . . cannot always be presumed, especially where a claim of racial discrimination is made"). For these reasons, as well, the union cannot be seen (continued...)

Amici urge the Court to reaffirm this consistent line of precedent. Specifically, this Court should hold that an arbitration provision in a collective bargaining agreement cannot waive an individual employee's right to a judicial forum to litigate statutory civil rights claims because the adoption of such a provision through the collective bargaining process does not constitute a knowing, intelligent, and voluntary waiver of the right to a judicial forum by the individual employee rightholder.

C. The Court Below Erred In Construing *Gilmer* To Mandate Enforcement Of Arbitration Agreements That Are Not Knowing And Voluntary

In *Gilmer*, 500 U.S. 20, this Court enforced a provision in a securities registration agreement that required the plaintiff to arbitrate his statutory claim under the Age Discrimination in Employment Act, 29 U.S.C. §621 *et seq.* Many lower courts, including the Fourth Circuit in this case, have interpreted *Gilmer* as virtually requiring them to enforce contractual arbitration provisions with regard to statutory civil rights claims, regardless of the language of the provision or the circumstances under which it was adopted. The position of the Fourth Circuit undeniably carries the error farther than other lower courts by totally ignoring any possible distinction between individual employee contracts and collective bargaining agreements, and thus treating *Alex-*

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[8] (...continued)
as a proxy for the individual employee in deciding whether to pursue a statutory discrimination claim through arbitration rather than litigation.

ander as though it had been overruled by *Gilmer*.[9] The decision below nonetheless reflects a more broadly held misconception about the meaning of *Gilmer* that this Court should now correct.

Specifically, there is nothing in *Gilmer* that is inconsistent with the traditional waiver standard advocated in this brief or that can fairly be read as holding that even nonnegotiable arbitration clauses imposed as a condition of employment must be enforced. The narrow facts of *Gilmer* simply do not support such an expansive interpretation of the Court's language. Among other things, there does not appear to have been any dispute in *Gilmer* that the arbitration provision at issue was applicable to statutory discrimination claims. The majority in *Gilmer* pointed to this as one important factor distinguishing the case from *Alexander* and its progeny: "[T]hose cases did not involve the issue of the enforceability of an agreement to arbitrate statutory claims." 500 U.S. at 35.

More importantly, this Court stressed that Gilmer, a corporate manager of financial services, was an "experienced businessman," who was capable of assessing the consequences of his contractual commitments. *Id.* at 33. The Court found no evidence that he had been "coerced or defrauded into agreeing to the arbitration clause in the registration application." *Id.* In the Court's view, Gilmer was someone who had knowingly and voluntarily "'made the bargain to arbitrate,' . . . [and therefore] 'should be held to it.'" *Id.* at 26 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

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[9] Just last Term, this Court cautioned the lower courts about assuming that "our more recent cases have, by implication, overruled an earlier precedent." *Agostini v. Felton*, 117 S.Ct. at 2017.

The *Gilmer* Court recognized that there would often be unequal bargaining power between employers and employees, which might affect the validity of an arbitration agreement. 500 U.S. at 33. But because the Court did not believe that Gilmer himself had suffered the effects of unequal bargaining power, it had no occasion to consider what the legal import of that inequality might be. Lacking an appropriate record, it is hardly surprising that the Court declined to adopt a *per se* rule invalidating all contractual arbitration provisions.[10] That judicial restraint hardly justifies the conclusion that the Court in *Gilmer* intended to give a green light to employers who use their superior bargaining power to impose mandatory arbitration provisions on their employees as a nonnegotiable condition of employment. As discussed below, such agreements cannot be upheld without stripping the waiver doctrine of all practical meaning. *See* p.20, *infra*.

In applying *Gilmer* (and *Alexander*), lower courts should be instructed to consider whether an agreement to arbitrate employment disputes constituted a knowing, intelligent, and voluntary waiver of the employee's individual right to a judicial forum and a jury trial for the adjudication of statutory discrimination claims. Although the arbitration agreement in *Gilmer* might have survived this scrutiny, many other mandatory arbitration provisions will not.[11]

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[10] "Mere inequality in bargaining power, however, is not a sufficient reason to hold that arbitration agreements are *never* enforceable in the employment context." *Id.* (emphasis added).

[11] One need not quarrel with *Gilmer*'s refusal to adopt a *per se* rule against all arbitration agreements in the employment context to recognize that there are a number of recurring fact patterns that may well justify a *per se* rule against the enforceability of arbitration agreements in specified circumstances. Among the more troubling scenarios discussed below are situations where the employee never agreed to the arbitration

(continued...)

This reminder is unfortunately necessary because the lower courts have gone seriously astray in construing *Gilmer* to require enforcement of arbitration agreements even when imposed as an involuntary or unknowing condition of employment. Moreover, by misreading *Gilmer,* the lower courts have felt free to ignore the undeniable fact that many employees confronted with a predispute arbitration agreement are simply not in a position to know or understand the significance of the right to a judicial forum that they are being asked to waive: while the need for employment is tangible and immediate, the value of a judicial forum for a potential future dispute is hypothetical and remote.

In addition to this overriding issue, the post-*Gilmer* cases reveal numerous other problems associated with predispute arbitration agreements. For example, many predispute arbitration provisions (such as the one at issue in this case) are vague and unclear about whether they in fact apply to statutory antidiscrimination claims.[12] They speak generally about "disputes relating to the terms and conditions of employment" or "disputes arising under this contract." Where it cannot be said with certainty that a contractual arbitration provision applies to statutory employment discrimination claims, the victimized employee cannot be held to have made a "knowing" waiver of his right to a judicial

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[11] (...continued)
provision (which was imposed by an employer through an employee handbook or other document), as well as situations, like the present case, in which the arbitration provision was negotiated between an employer and a union as part of a collective bargaining agreement and, therefore, could not constitute a valid waiver, by the employee, of his individual statutory rights.

[12] *See* note 2, *supra.*

forum. *See Prudential Insurance Co. of America v. Lai,* 42 F.3d at 1305 (where employment contract did not describe the disputes the parties had agreed to arbitrate, plaintiffs "did not knowingly contract to forego their statutory remedies in favor of arbitration"); *Renteria v. Prudential Insurance Co. of America,* 113 F.3d 1104 (same); *cf. Fuentes v. Shevin,* 407 U.S. at 95 (emphasis in original)("a waiver of constitutional rights in any context must, at the very *least,* be clear").[13] Clarity may not be enough to save a predispute arbitration agreement if the other requirements of a valid waiver have not been met in any context. Ambiguity, standing alone, should be enough to condemn it.[14]

In other cases, courts have enforced mandatory arbitration provisions where employers have unilaterally imposed them on employees already on the job. *See, e.g., Patterson v. Tenet Healthcare, Inc.,* 113 F.3d 832, 833 (8th Cir. 1997) (enforcing arbitration clause contained in employee handbook issued four years after plaintiff began the job); *Cole v. Burns Int'l Security Services,* 105 F.3d 1465, 1469 (D.C.Cir. 1997)(enforcing arbitration agreement current employees were required to sign "in consideration of" continued employment). In these circumstances, as in the collective bargaining context, there has been no meaningful agreement by the employee, and any purported waiver of statutory rights should not be deemed voluntary.

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[13] *See* note 6, *supra.*

[14] In some cases, either the mandatory arbitration provision itself, or provisions relevant to determining its scope, is not contained in the employment contract but instead may be found in some referenced documents. Often, these supplemental documents are not even provided to the employee at the time the contract is signed. *See, e.g., Prudential Ins. Co. v. Lai,* 42 F.3d at 1301; *Hooters of America, Inc. v. Phillips,* 1998 U.S. Dist. LEXIS 3962 (D.S.C. Mar. 12, 1998), at *56-57.

Additionally, lower courts have enforced contractual arbitration provisions imposed on employees by their employers under circumstances that leave no doubt that the arbitration "agreements" are in fact non-negotiable conditions of employment. *See, e.g., Great Western Mortgage Corporation v. Michele Peacock*, 110 F.3d 222, 224 (3d Cir.), *cert. denied*, __ U.S. __, 118 S.Ct. 299 (1997)(upholding arbitration provision where employee had been required to sign arbitration agreement before employer would consider her job application); *Mago v. Shearson Lehman Hutton, Inc.*, 956 F.2d 932, 933 (9th Cir. 1992)(same where employment application contained arbitration agreement).

Where an employee who lacks effective bargaining power has been compelled to sign a contract containing a nonnegotiable, boilerplate arbitration provision as a condition of employment, the acceptance of this provision by the employee should not be deemed a voluntary waiver of statutory rights. Otherwise, employers have been effectively given the unilateral power to opt out of the judicial enforcement scheme created by Congress to protect workers against employment discrimination. This result is worse than illogical. It creates an "inherent conflict" with the underlying purposes of both Title VII and the ADA, *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 227 (1989), which provides a further reason to reject the broad reading of *Gilmer* that is now so prevalent in the lower courts.[15]

It is critical, therefore, that the lower courts carefully scrutinize the facts surrounding alleged agreements to arbitrate statutory claims. The burden of proof must fall squarely on the party asserting that the agreement constitutes a valid prospective waiver of the right to go to court. In none of the foregoing circumstances, and many more like them, can the employees be said to have knowingly, intelligently, and voluntarily relinquished their right to a judicial forum to adjudicate their statutory employment discrimination claims.

D. Contrary To The Fourth Circuit Ruling, The Legislative History Of The Americans With Disabilities Act (And Related Civil Rights Statutes) Does Not Support Mandatory Arbitration Of Statutory Claims

In both the decision below and its prior decision in *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d at 881-82, the Fourth Circuit Court of Appeals claimed to find support for mandatory arbitration of employment discrimination claims in the text and legislative history of the ADA and the 1991 Civil Rights Act. *See* Pet.App., at 5a (finding in ADA a "statutory preference for arbitration"); *Austin*, 78 F.3d at 881 ("The language of the statutes could not be any more clear in showing Congressional favor toward arbitration"). This is a gross misreading of these statutory provisions. In §12212 of the ADA and §118 of the Civil Rights Act, Congress endorsed voluntary agreements to submit employment disputes to arbitration, but only as a supplement to the statutory enforcement scheme.

The ADA was enacted to provide a "clear and comprehensive national mandate" to eliminate "various forms of discrimination," including employment discrimination, against people with disabilities. 42 U.S.C. §§12101(a)(5), (b)(1)(2). Section 513 of the ADA, 42 U.S.C. §12212, provides:

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[15] Congress has twice recognized the fundamentally involuntary nature of such mandatory arbitration provisions in collective bargaining agreements and individual employment contracts alike when it enacted statutory provisions encouraging the *voluntary* use of alternative dispute resolution for statutory discrimination claims. *See* pp.23-24, *supra*.

> Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under this chapter.

Because the ADA was enacted in 1990, the phrase "to the extent authorized by law" clearly refers to the law prevailing before this Court's 1991 decision in *Gilmer*. In that pre-*Gilmer* era, most lower courts had interpreted *Alexander* to bar any "prospective waiver" of the right to litigate a statutory employment discrimination claim, whether in a collective bargaining agreement or an individual employment contract. *See, e.g.*, *Swenson v. Management Resources Int'l, Inc.*, 858 F.2d 1304, 1308-09 (8th Cir. 1988), *cert. denied*, 493 U.S. 848 (1989)("*Alexander* makes clear that Congress intended the right in employment discrimination cases to have access to judicial remedies to outbalance the federal policy favoring arbitration); *Nicholson v. CPC Int'l, Inc.*, 877 F.2d 221, 229 (3d Cir. 1989); *Rosenfeld v. Dep't of the Army*, 769 F.2d 237, 239 (4th Cir. 1985)("The plain lessor on *Alexander* . . . is that Congress entrusted the ultimate resolution of questions of discrimination to the federal judiciary"); *Lyght v. Ford Motor Co.*, 643 F.2d 435, 439 (6th Cir. 1981); *Holley v. Seminole County School District*, 755 F.2d 1492, 1503 (11th Cir. 1985); *Utley v. Goldman Sachs & Co.*, 883 F.2d 184, 186-87 (1st Cir. 1989).

The judicial history is echoed in the legislative history of §12212, which further reinforces the conclusion that Congress intended to preclude involuntary waivers of the right to pursue ADA claims in court. The House Judiciary Committee report stated:

> "any agreement to submit disputed issues to arbitration, whether in the context of a collective bargaining agreement or in an employment contract, does not preclude the affected person from seeking relief under the enforcement provisions of this act . . . . [T]he approach articulated by the Supreme Court in *Alexander v. Gardner-Denver Co.* applies equally to the ADA and [the Committee] does not intend that the inclusion of [§12212] be used to preclude rights and remedies that would otherwise be available to persons with disabilities."

H.R. Rep. No. 485, pt. 3, 101st Cong., 2d Sess. at 76-77, *reprinted in* 1990 U.S.C.C.A.N. 445, 499-500. This statement was expressly adopted in the House Conference report, which added "[i]t is the intent of the conferees that the use of these alternative dispute resolution procedures is completely voluntary. Under no condition would an arbitration clause in *a collective bargaining agreement or employment contract* prevent an individual from pursuing their rights under the ADA." H.R. Conf. Rep. No. 596, 101st Cong., 2d Sess. at 89, *reprinted in* 1990 U.S.C.C.A.N. 565, 598 (emphasis added).

A similar legislative history can be found in the 1991 Civil Rights Act. The Act was overwhelmingly adopted by Congress to promote two chief goals: to increase the remedies available under Title VII so that plaintiffs could for the first time be fully compensated for the injuries of discrimination, and to make enforcement of the Act more effective through substantive and procedural amendments that would make discrimination suits easier to bring and to prove. *See Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 1998 U.S. Dist. LEXIS 877, at *34 (thoroughly analyzing legislative history of the 1991 Civil Rights Act). The Act's legislative history reaffirms that "[i]n enacting Title VII, Congress intended to vindicate the substantial public interest in a discrimination-free workplace by encouraging private citizens to enforce the statute's guarantees." H.R. Rep. No. 40(I), at 75, 102d Cong., 1st Sess., *reprinted in* 1991 U.S.C.C.A.N. 549, 613.

Section 118 of the 1991 Civil Rights Act speaks directly to the issue of the arbitrability of Title VII claims, in language almost identical to that in the ADA: arbitration "is encouraged to resolve disputes . . . [w]here appropriate and to the extent authorized by law." Pub.L.No. 102-166 §118, 105 Stat. 1071, 1081 (1991)(codified as a historical and statutory note to 42 U.S.C. §1981). The House Reports on this section, drafted before *Gilmer*, make clear that §118 was not intended to encourage waivers of an injured employee's right to a judicial forum. Rather, they stress that "any agreement to submit disputed issues to arbitration, *whether in the context of a collective bargaining agreement or in an employment contract*, does not preclude the affected person from seeking relief under the enforcement provisions of Title VII." H.R. Rep. No. 40(I), at 97; H.R. Rep. No. 40(II), at 41, *reprinted in* 1991 U.S.C.C.A.N. 694, 735 (emphasis added). Section 118, the Reports explain, is intended to be "consistent with the Supreme Court's interpretation of Title VII in *Alexander v. Gardner-Denver Co.*" *Id.* Echoing words taken directly from *Alexander*, Congress stated that the encouragement of alternative dispute resolution was meant to "supplement, not supplant" existing procedures, *compare Alexander*, 415 U.S. at 48, and should not be "used to preclude rights and remedies that would otherwise be available." H.R. Rep. No. 40(I), at 97; H.R. Rep. No. 40(II), at 41.[16]

In addition to the express endorsement of *Alexander*, Congress provided further evidence of its intent to preclude mandatory arbitration by rejecting an amendment that would have encouraged the use of arbitration "in place of judicial resolution." Such agreements, the Education and Labor Committee explained, would have allowed employers to "refuse to hire workers unless they signed a binding statement waiving all rights to file Title VII complaints." H.R. Rep. No. 40(I), at 104, *reprinted in* U.S.C.C.A.N. 642. This "would fly in the face of Supreme Court decisions holding that workers have the right to go to court, rather than being forced into compulsory arbitration, to resolve important statutory and constitutional rights . . ." *Id.* "American workers," the Committee concluded, "should not be forced to choose between their jobs and their civil rights." *Id.* The rejection of this amendment in favor of the final version of §118 provides "strong evidence" of Congress' intent. *See Thompson v. Thompson*, 484 U.S. 174, 185 (1988).

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[16] Even before 1991, the civil rights laws were designed to facilitate employees' private enforcement actions by giving employees a choice of jurisdiction in federal or state court. *See, e.g.*, 29 U.S.C. §626(c)(1) (concurrent jurisdiction of federal and state courts for ADA claims). This Court has recognized that such "provisions for concurrent jurisdiction serve to advance the objective of allowing [claimants] a broader right to select the forum for resolving disputes[.]" *Gilmer*, 500 U.S. at 29, quoting *Rodrigues de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 483 (1989). To be sure, *Gilmer* stresses that arbitration "is consistent" with the flexibility such a concurrent jurisdiction provision affords, *id.*; but that is only the case if the arbitration agreement is truly *voluntary*. Where *Gilmer* is applied broadly to enforce an arbitration agreement imposed by the employer as a non-negotiable condition of employment, it is the *employer's* choice of forum that is enforced, and the employee-plaintiff's jurisdictional choice is restricted. Such a procedure stands the statutory scheme of broadening the plaintiff's jurisdictional choices on its head. In sum, whatever might be said for truly voluntary predispute arbitration agreements, arbitration provisions imposed on employees as a non-negotiable condition of employment are in inherent conflict with the civil rights laws' grant of jurisdictional choices to the employee.

Nor can it be argued that this Court's decision in *Gilmer*, after committee consideration of the bill but before final passage, affected congressional intent with regard to §118. In the House debate immediately prior to the Act's passage on November 7, 1991, post-*Gilmer*, the chair of the Judiciary Subcommittee on Civil and Constitutional Rights reiterated that §118 was "intended to be consistent with . . . *Alexander v. Gardner-Denver*," and added for good measure:

> This section contemplates the use of voluntary arbitration to resolve specific disputes after they have arisen, not coercive attempts to force employees in advance to forego statutory rights. No approval whatsoever is intended of the Supreme Court's recent decision in *Gilmer* . . . or any application or extension of it to Title VII.

137 Cong.Rec. H9505-01, *H9530 (November 7, 1991).

Indeed, one of the major purposes of the 1991 Civil Rights Act was to create a new jury trial right for Title VII plaintiffs. Before passage of the 1991 Civil Rights Act, most courts had concluded that Title VII plaintiffs had no right to a jury trial. *See, e.g., Great Am. Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 375 & n.19 (1979). In response, the 1991 Civil Rights Act explicitly recognized a right to a jury trial for victims of intentional discrimination in order to "protect the rights of all persons under the Seventh Amendment . . ." H.R. Rep. 40(II), at 29. It makes little sense to conclude, as the Fourth Circuit did, that Congress would have finally recognized this right in one section of the 1991 Act, only to empower employers in a different section of the same act, to avoid trial by jury -- and a judicial forum altogether -- by requiring employees to waive their rights and agree to arbitrate claims as a condition of employment. *Cf. Pryner v. Tractor Supply Co.*, 109 F.3d 354, 363 (7th Cir. 1997)(Posner, J.)("It would be at least a mild paradox for Congress, having in another amendment that it made to Title VII in 1991 conferred a right to trial by jury for the first time . . . to have empowered unions, in those same amendments, to prevent workers from obtaining jury trials in these cases").

Thus, the legislative history of the ADA and the 1991 Civil Rights Act support the position urged by *amici*. The provisions in those acts concerning arbitration and other forms of alternative dispute resolution were intended to supplement employees' rights to a judicial forum to adjudicate their claims. No mandatory arbitration provision should be construed to waive an employee's right to go to court, unless the court can find that the provision constitutes a knowing, intelligent, and voluntary waiver of that right by the individual rightholder.

CONCLUSION

For the reasons stated above, this Court should reverse the decision of the Fourth Circuit Court of Appeals dismissing this action and remand the case for further proceedings.

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No. 97-889 (12)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

CEASAR WRIGHT,
Petitioner,
v.

UNIVERSAL MARITIME SERVICE CORP.;
STEVENS SHIPPING & TERMINAL COMPANY;
STEVEDORING SERVICES OF AMERICA;
RYAN-WALSH, INC.;
STRACHAN SHIPPING COMPANY;
CERES MARINE TERMINALS, INC.; and
SOUTH CAROLINA STEVEDORES ASSOCIATION,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit**

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND THE INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AND ITS LOCAL 1422 AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

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35 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. LIKE COLLECTIVE BARGAINING AGREEMENTS GENERALLY, THE AGREEMENT IN THIS CASE PROVIDES FOR A GRIEVANCE-ARBITRATION SYSTEM THAT EMPHASIZES NEGOTIATION OVER ADJUDICATION AND THAT PROVIDES THAT THE PARTIES TO THE COLLECTIVE BARGAINING AGREEMENT, THE UNION AND THE EMPLOYER, ARE THE PARTICIPANTS IN THE PROCESS 5

II. THIS COURT HAS ALREADY DECIDED THAT AN INDIVIDUAL EMPLOYEE'S VINDICATION OF PUBLIC LAW INDIVIDUAL EMPLOYEE RIGHTS IN COURT IS NOT AFFECTED BY ANY COLLECTIVELY-BARGAINED EMPLOYER-UNION GRIEVANCE-ARBITRATION PROCESS COVERING THE EMPLOYEE'S BARGAINING UNIT 10

III. THE REQUIREMENT THAT INDIVIDUAL EMPLOYEES UTILIZE COLLECTIVELY-BARGAINED UNION-EMPLOYER GRIEVANCE-ARBITRATION PROCEDURES WHERE THERE IS A CLAIMED VIOLATION OF RIGHTS CREATED BY THE COLLECTIVE BARGAINING AGREEMENT IS ONE BASED ON A COMPLEX OF LABOR LAW POLICY PRINCIPLES THAT HAVE NO APPLICATION TO PUBLIC LAW INDIVIDUAL EMPLOYEE RAIGHTS, AND NO RESEMBLANCE TO THE CONTRACT-BASED *GILMER* ARBITRATION REQUIREMENT PRINCIPLE 16

CONCLUSION 30

TABLE OF AUTHORITIES

CASES

Page

AT&T Tech. Inc. v. Communications Workers, 475 U.S. 643 (1986) ... 20

Airline Pilots Ass'n v. O'Neill, 499 U.S. 65 (1991) ... 11, 28

Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) ... *passim*

Allis-Chalmers v. Lueck, 471 U.S. 202 (1985) ... 11, 12

American Steel Foundries v. Tri-City Trades Council, 257 U.S. 184 (1921) ... 10, 17

Atchison, Topeka, & Sante Fe Railway Co. v. Buell, 480 U.S. 557 (1987) ... 12

Barrentine v. Arkansas-Best Freight System, 450 U.S. 728 (1981) ... *passim*

Director, OWCP v. Greenwich Colleries, 512 U.S. 267 (1994) ... 15

Fort Halifax Packing Co. v. Coyne, 482 U.S. 1 (1987) ... 12

Gateway Coal Co. v. United Mine Workers of America, 414 U.S. 368 (1974) ... 11,21

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) ... *passim*

Hawaiian Airlines v. Norris, 512 U.S. 246 (1994) ... 12, 21, 22

Hilton v. South Carolina Public Railways Comm'n, 502 U.S. 197 (1991) ... 15

Hubbard v. United States, 514 U.S. 695 (1995) ... 15, 16

Humphrey v. Moore, 375 U.S. 335 (1964) ... 28

International Brotherhood of Electrical Workers v. Foust, 442 U.S. 42 (1979) ... 27

International Union of Electrical Workers v. Robbins & Mayers, 429 U.S. 229 (1976) ... 15

Lingle v. Norge Division of Magic Chef, Inc., 486 U.S. 399 (1988) ... 12, 15

Litton Financial Printing v. NLRB, 501 U.S. 190 (1991) ... 20

Livadas v. Bradshaw, 512 U.S. 107 (1993) ... 12, 14

Local 174, Teamsters v. Lucas Flour, 369 U.S. 95 (1962) ... 18

McDonald v. City of West Branch, 466 U.S. 284 (1984) ... 12

TABLE OF AUTHORITIES—Continued

Page

Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985) ... 12

Mitsubishi Motors Corp. v. Solar Chrysler-Plymouth Inc., 473 U.S. 614 ... 4, 13, 25

NLRB v. Allis-Chalmers Manufacturing Co., 388 U.S. 175 (1967) ... 24

Nolde Brothers Inc. v. Local No. 358, Bakery & Confectionary Workers Union, 430 U.S. 243 (1977) ... 20

Paperworkers v. Misco, 484 U.S. 29 (1987) ... 11, 19, 20

Patterson v. McClean Credit Union, 491 U.S. 164 (1989) ... 15, 16

Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965) ... 11, 22, 24

Rodriquez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989) ... 13

Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987) ... 13

Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960) ... 20

Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960) ... *passim*

Teamsters v. Oliver, 358 U.S. 283 (1959) ... 18

Vaca v. Sipes, 386 U.S. 171 (1967) ... 11, 25, 26, 27

STATUTES

9 U.S.C. § 1 ... 13

29 U.S.C. § 158(a)(5) ... 23

29 U.S.C. § 158(d) ... 23

29 U.S.C. § 159(a) ... 23

29 U.S.C. § 185 ... 15

29 U.S.C. § 173(d) ... 20

42 U.S.C. § 12212 ... 15

45 U.S.C. § 151(a) ... 22

Pub. L. No. 102-66, § 118, 105 Stat. 1071, 1081 ... 15

LEGISLATIVE HISTORY

H.R. Rep. No. 40, 102nd Cong., 2nd Sess. (1991) ... 15

H.R. Rep. No. 485, 101st Cong., 2nd Sess. (1990) ... 15

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND THE INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AND ITS LOCAL 1422 AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

This brief *amici curiae* is filed by the American Federal of Labor and Congress of Industrial Organizations, a federation of 78 national and international labor organizations with a total membership of approximately 13 million working men and women, and by the International Longshoremen's Association, and its Local 1422, the exclusive bargaining representatives of the collective bargaining unit in which petitioner Ceasar Wright was employed. The parties to this case have consented to the filing of this brief as provided for in the Rules of the Court.*

SUMMARY OF ARGUMENT

The respondent-employers maintain that Ceasar Wright may not proceed with his Americans with Disabilities Act ("ADA") claim in court, because his exclusive bargaining representative did not take his ADA claim to arbitration under the collective bargaining agreement dispute resolution system covering his bargaining unit.

I. Mr. Wright pursued his statutory claim in court rather than under the collective bargaining agreement's dispute resolution system. One track of that system provides for dispute resolution of certain claims at the behest of an individual employee but is expressly limited to contract disputes and does not result in adjudication by a neutral arbitrator. The agreement also establishes a multi-tiered procedure for settling "matters under dispute" with access to a neutral arbitrator only if the union and the employers deadlock at the final stage. Thus, the employers' preclusion argument is really a contention that

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* No counsel for a party authored this brief *amici curiae* in whole or in part, and no person or entity, other than the *amici curiae*, made a monetary contribution to the preparation or submission of this brief.

Mr. Wright was relegated for final and binding determination of his statutory claims to a system that is largely one of negotiation, not adjudication, and in which access to a neutral decisionmaker is determined by the union.

II. This Court has already decided, in a long line of cases, that an individual employee's right to litigate public law claims in court is not affected by the availability of a collective bargaining agreement dispute resolution system such as the one here. Beginning with *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), this Court has made it clear that the requirement that employees resort to collectively-bargained grievance-arbitration systems is not applicable where the employee's claim derives not from the collectively-bargained system of private governance but from public law. Nothing in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), detracted from that basic principle. *Stare decisis* is therefore a full and sufficient basis for reversing the Fourth Circuit's holding in this case precluding the litigation of Ceasar Wright's ADA claim.

III. In particular, this is decidedly not a situation in which the *Gardner-Denver* resolution of the issue in this case can be shown to be fundamentally incorrect, either *ab initio* or as a result of later decisions. The basic premises of *Gilmer* are that where two parties agree in advance that subsequent disputes will be arbitrated rather than litigated, there is no reason not to enforce that promise like any other, since substantive rights are not thereby altered. Collective bargaining agreement union-employer grievance-arbitration systems, in contrast, are a substitute for strikes, not for litigation, and are designed to advance the interests of the bargaining unit as a whole. Arbitrators under labor agreements are expected to make decisions based, in part, on the impact on the ongoing relationship between the employer and the employees as a group, and not on a strictly rights-based model. It follows that the policy favoring such processes has application only to the enforcement of claims invoking the terms, express and implied, of the collective bargaining agreement itself. The federal statute declaring "desirable" union-employer final dispute resolution systems under collective bargaining agreements expressly so states, and this Court's articulation of the policy favoring binding labor arbitration is also so limited.

Further, this Court's conclusion that individual employees must resort to collectively-bargained dispute resolution systems for the vindication of individual rights declared in the system of private law created by the collective bargaining agreement was derived from the national labor policy, not from contract concepts. And, the Court has expressly recognized, as well as, that exclusive bargaining representatives must have wide discretion with regard to prosecution of employee claims in collectively bargained grievance-arbitration systems if the system is to function effectively.

Collective bargaining agreement dispute resolution systems therefore differ fundamentally in purpose, structure, and potential to compromise substantive rights from the direct, individual agreement enforced in *Gilmer*, and nothing in *Golmer* supports the overruling of *Gardner-Denver* and its progeny.

ARGUMENT

In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23 (1991), this Court held that "a claim under the Age Discrimination in Employment Act of 1967 can be subjected to compulsory arbitration pursuant to an arbitration agreement" in which the claimant "agreed to arbitrate any dispute, claim or controversy" with his employer including those "arising out of [his] employment or termination of employment." In so holding, the *Gilmer* Court recognized the "liberal federal policy favoring arbitration agreements," (*id.* at 25 *quoting Moses H. Cone Memorial Hospital v. Mercury Constitution Corp.*, 460 U.S. 1, 24 (1983)), and stated that "having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue," (500 U.S. at

26 *quoting Mitsubishi Motors Corp. v. Solar Chrysler-Plymouth Inc.*, 473 U.S. 614, 628 (1985).

Ceasar Wright, the employee-petitioner in this case, has *not* made any such agreement to substitute arbitration for litigation of his Americans with Disabilities Act (ADA) claim. And, there is *nothing* in the ADA, in any other employee ADA claim, or for the arbitration of any other public law individual employee rights claim, absent an employee agreement to substitute arbitration for court litigation of the claim.

So far as appears then, the employer-respondents' contention that Mr. Wright must arbitrate his ADA claim, and is barred from litigating his claim in federal court in the manner provided for in the ADA itself, fails on its face.

To avoid that conclusion, the employer-respondents argue: that while there is no Ceasar Wright arbitration agreement, there is a Local 1422, International Longshoremen's Association-South Carolina Stevedores Association collective bargaining agreement; that the collective bargaining agreement provides, *inter alia*, for the arbitration of "matters under dispute . . . between the Local and [an] individual Employer;" that Mr. Wright is an employee in the collective bargaining unit covered by the collective agreement; that Local 1422 is the exclusive bargaining representative of that bargaining unit; and that the collective agreement's arbitration clause should therefore be read both to cover public law individual employee rights claims, such as ADA claims, and to be a binding agreement between Mr. Wright and the Steveodres Association to substitute arbitration of Mr. Wright's ADA claim for court litigation of that claim.

In the argument that follows we show that collective bargaining agreements such as this one and their provision for arbitration of union-employer disputes cannot be transmuted into employee-employer agreements to arbitrate public law individual employee rights claims.

I. LIKE COLLECTIVE BARGAINING AGREEMENTS GENERALLY, THE AGREEMENT IN THIS CASE PROVIDES FOR A GRIEVANCE-ARBITRATION SYSTEM THAT EMPHASIZES NEGOTIATION OVER ADJUDICATION AND THAT PROVIDES THAT THE PARTIES TO THE COLLECTIVE BARGAINING AGREEMENT, THE UNION AND THE EMPLOYER, ARE THE PARTICIPANTS IN THE PROCESS.

To set the legal arguments that follow in perspective, it is useful to begin by focusing on the genesis of the current case, and on the provisions of the collectively-negotiated grievance-arbitration provisions in particular. As that consideration shows, the collective bargaining agreement establishes a process for extremely expedited consideration by the union and the employers, the parties who negotiated that agreement, of the disputes that arise daily on the docks and for arbitration only in certain circumstances, and then only if the union and employer representatives cannot come to an agreed upon solution. Thus, while the employer-respondents argue that Ceasar Wright should have arbitrated, rather than litigated his ADA claim, under the collective bargaining agreement Mr. Wright had *no* right to take his claim to arbitration.

1. Ceasar Wright, a longshoreman, first brought a claim under the Longshore and Harbor Workers' Compensation Act for disability benefits when he was injured at work. Pet. App. 3a. Three years after that claim was settled, Mr. Wright sought to return to work, and the hiring hall run by Local 1422 referred him fo employment. *Id.* After initially accepting the referrals of Mr. Wright for a period of approximately two weeks, the employer-respondents refused to employ Mr. Wright because of his prior disability and took the position that the collective bargaining agreement recognized their right to do so. *Id.* In response, Mr. Wright "initially followed the proper procedure under the collective bargaining agreement for filing a grievance against [the employers]." Pet. App. 16a.

Local 1422 wrote to the employer-respondents, denying that the contract granted the employers any right to refuse employment to Ceasar Wright and asserting in addition that, even "[i]f Ceasar Wright is proven to have limited disability," the ADA protects his right to return to work, so long as he "can perform his duties." Fourth Cir. App. 258. Local 1422 did not, however, pursue the matter of Mr. Wright's reemployment further. Instead, reflecting its understanding that there was no barrier to doing so, Local 1422 advised Mr. Wright to pursue his statutory claim through the normal administrative and judicial channels. Pet. App. 3a.

Ceasar Wright did in fact then pursue the matter, filing suit under the ADA against six stevedoring companies and their multiemployer association, the South Carolina Stevedores Association. The defendants (the employer-respondents in this Court), in response, raised as an affirmative defense Mr. Wright's "fail[ure] to exhaust the adequate remedies and procedures afforded him under the collective bargaining agreement between Local 1422 and SCSA, . . ., as well as the remedies provided under the Longshore Seniority Plan." Jt. App. 30a. And, when Mr. Wright offered to arbitrate the ADA dispute at that juncture, the employers insisted that while Mr. Wright could have taken his grievance to the Charleston Longshore Seniority Board under the Longshore Seniority Plan, or Local 1422 could have taken a grievance to arbitration under Section 15(B) of the collective bargaining agreement, the time limits for both had run (although the ADA lawsuit itself was timely). Fourth Cir. App. 264.

2. The first of the two union-employer dispute resolution schemes that the employer-respondents maintain should have been exhausted, the Seniority Plan, does provide for "resolution of a 'dispute or grievance' brought by an individual employee.'" Jt. App. 49a.[1] But that Plan *does not provide for arbitration at all.* Rather, a "dispute or grievance" may be submitted to a "Seniority Board" composed of two union representatives and two employer representatives, and, if the Board deadlocks, to a two person committee, composed of one individual chosen by Local 1422 and one by the Stevedores Association, "for final determination," *with no provision for breaking a deadlock between the two. Id.* at 48a. The Seniority Plan procedure, then, is *not* a procedure for the resolution of claims by a neutral arbitrator. Nor is it a system for the resolution of claims based on public law individual employee rights. The Seniority Board is restricted to resolving a "dispute concerning or arising out of the terms and/or conditions of the Agreement, or dispute involving the interpretation or application of this Agreement, or dispute arising out of any rule adopted for its implementation." *Id.*

The second, more general, union-employer dispute resolution procedure invoked by the employer-respondents is set out in Section 15(B) of the collective bargaining agreement. Jt. App. 43a-45a. That provision begins by stating that "[m]atters under dispute which cannot be promptly settled between the Local and the individual Employer shall, not later than 48 hours after such discussion, be referred" to a Port Grievance Committee, composed of two union representatives and two employer representatives. *Id.* at 43a. If that committee does not reach a majority resolution within five days, then the dispute is referred to the "Joint Negotiating Committee," functioning as a "District Grievance Committee," again composed of employer and union representatives, this time from ports other than the one in which the dispute originated; committee members from the originating port "may participate in the discussions but may not vote." *Id.*, at 43a-44a. "A majority decision of this Committee" is "final and binding on both parties [to the dispute] and on all Employers signing th[e] Agreement." *Id.* at 44a. "In the event the Committee is unable to reach a majority decision within 72 hours after meeting to discuss the case," the Committee is directed by the Agreement to "employ a professional arbitrator." *Id.*

---

[1] We stress that we refer to these provisions of the collective bargaining agreement in response to the employer-respondents' invocation of the provisions and are not agreeing with the employers as to the applicability of any particular provision to Mr. Wright's circumstances.

In sum, only *after* the Port Grievance Committee "cannot reach an agreement" and the District Grievance Committee is "unable to reach a majority decision" is a "matter[] under dispute" submitted to a "professional arbitrator." Jt. App. 44a. In that event, Section 15(B) admonishes that in selecting an arbitrator, "thought will be given to a person who is knowledgeable and familiar with the problems of the Longshore industry." *Id.* And, Section 15 also provides that "[a]ll interpretations of this Agreement will be made in accordance with" the contractual procedure, and that "[a]nything not contained in this Agreement shall not be construed as being part of this Agreement." *Id.* at 45a-46a §§ 15(E) & 15(F).[2]

Under the Section 15(B) procedure, then, the processing of a grievance is controlled from start to finish by Local 1422, not by the individual grievant. Further, the process is on its face as much one of negotation as of adjudication, with the union committee representatives having

the authority, after discussion, to compromise a grievance by agreeing with management representatives concerning its resolution. And, the time limits imposed are exceedingly short—a matter of days—indicating that the need to come to a quick resolution was of utmost importance to the contracting parties.

3. The employer-respondents' arguments in this case have proceeded in full awareness of the nature of the grievance-arbitration systems set out in the collective bargaining agreement. Thus, in opposing a motion by Caesar Wright to compel arbitration, the employers maintained that Mr. Wright was bound by Local 1422's decision not to prosecute a grievance regarding his ADA rights under Section 15(B), arguing that Mr. Wright's "membership in a collective bargaining unit subjects him to the possibility that his grievance might not be deemed worthy of pursuit to arbitration" and that "union . . . conduct evincing an abandonment of the grievance[] has the same finality as an arbitration award adverse to the grievant." D.S.C. Dk. No. 39, Defs. Mem. in Opp. 5-6. The employers added that "the union is not required to provide notice to, or obtain the consent of, the grievant in order to abandon the grievance," *id.* at 5, and that the individual's "interest in having his grievance arbitrated cannot override the interest of his fellow Longshoremen to expend their dues money in other ways," because "this is the essence of collective representation." *Id.* at 7. Finally, the defendants recognized that Mr. Wright "is not a party to the collective bargaining agreement," and, on that basis, stated that Mr. Wright was "unable to bring a motion (or a suit) to compel arbitration in the absence of a claim of union misconduct or unfair representation by the union." *Id.* at 4.

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[2] In support of its assertion that "[t]he arbitration clause at issue is particulary broad," the court of appeals quotes a portion of Section 15(F) describing the scope of the entire collective bargaining agreement. Pet. App. 4a. However, the arbitration clause is contained in Section 15(B), Jt. App. 43a-44a, and *not* in Section 15(F), *id.* at 44a-45a. Section 15(F) is an integration or "zipper" clause, and its function is to "close out bargaining during the contract term and to make the written contract the exclusive statement of the parties' rights and obligations." *NLRB v. Tomco Communications, Inc.*, 567 F.2d 871, 879 (9th Cir. 1978).

The district court, by contrast, relied upon Section 17—which states "the intention and purpose of all parties—that no provision or part of th[e] Agreement shall be violative of any Federal or State Law," Jt. App. 47a, in concluding that the "[p]laintiff and his union, through the collective bargaining agreement, were obligated to submit ADA and other claims to the grievance procedure." Pet. App. 17a. Section 17, however, is a "savings" clause, which merely provides that the parties do not intend their agreement to violate the public laws. This is a qualitatively different and far narrower undertaking than providing a private enforcement mechanism for the public laws.

II. THIS COURT HAS ALREADY DECIDED THAT AN INDIVIDUAL EMPLOYEE'S VINDICATION OF PUBLIC LAW INDIVIDUAL EMPLOYEE RIGHTS IN COURT IS NOT AFFECTED BY ANY COLLECTIVELY-BARGAINED EMPLOYER-UNION GRIEVANCE-ARBITRATION PROCESS COVERING THE EMPLOYEE'S BARGAINING UNIT.

Collective bargaining dispute resolution provisions, such as those summarized above, are designed for, and are well-adapted to, the settlement between the parties to a collective bargaining agreement—i.e., between the *union* and the *employer*—of issues concerning that agreement. The question presented in this case of the effect of that process on the access of bargaining-unit employee-claimants to a judicial forum is one to which this Court has devoted the most mature attention over a prolonged period and on which the Court has arrived at well-settled, solidly-grounded conclusions.

The question here, as the Court has recognized, is generated by Congress' two-fold response to a single economic dilemma. The dilemma, described by Chief Justice Taft at the beginning of modern labor law, is that

> A single employee was helpless in dealing with an employer. He was dependent ordinarily on his daily wage for the maintenance of himself and family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment. [*American Steel Foundries v. Tri-City Trades Council*, 257 U.S. 184, 209 (1921).]

And, Congress has addressed the dilemma not through a unitary labor policy but through "two aspects of national labor policy", which are in some instances—but not, as we will develop, in this instance—"in tension." *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728, 734 (1981):

> The first, reflected in statutes governing relationships between employers and unions, encourages the negotiation of terms and conditions of employment through the collective-bargaining process. The second, reflected in statutes governing relationships between employers and their individual employees, guarantees covered employees specific substantive rights.

For reasons we survey in detail below, in interpreting and applying the "collective bargaining process" law, this Court has recognized and applied a very strong presumption that workplace disputes arising under a collective bargaining agreement are subject to the dispute resolution system, if any, devised and administered by the parties to that relationship. *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 580 (1960); *see also, e.g., Gateway Coal Co. v. United Mine Workers of America*, 414 U.S. 368 (1974); *Allis-Chalmers v. Lueck*, 471 U.S. 220 (1985); *Paperworkers v. Misco*, 484 U.S. 29, 37-39 (1987). And, as a matter of policy derived from the labor laws governing the collective bargaining regime, this Court has also spelled out an obligation of individual bargaining unit employees—not themselves parties to the collective bargaining agreement—to proceed through, and be bound by, the collectively-bargained union-employer dispute resolution system, rather than through employee-initiated court litigation, as a means of vindicating rights derived from the collective agreement's "system of private law" (*Warrior & Gulf Nav. Co.*, 363 U.S. at 581). *See, e.g., Republic Steel v. Maddox*, 379 U.S. 650 (1965); *Vaca v. Sipes*, 386 U.S. 171 (1967); *Airline Pilots v. O'Neill*, 499 U.S. 65 (1991).

At the same time, this Court has held emphatically and consistently that the set of principles governing the obligation of employees to proceed through the collectively-bargained grievance-arbitration system simply has *no* application where the employee's claim derives not from the collectively bargained "system of industrial self-government," (*Warrior & Gulf Nav. Co.*, 363 U.S. at 580), but from the "statutes governing relationships between employers and their individual employees, [which] guarantee covered employees specific substantive rights" (*Barrentine*, 450 U.S. at 734). The Court has so held in a series of cases stemming from *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), and arising under a variety of different statutes and in a variety of procedural circumstances. *See, e.g., Gardner-Denver, supra* (employment discrimination action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., is not affected by availability of a collectively-bargained union-employer grievance-arbitration system to challenge the same employer action); *Barrentine, supra* (same, with respect to causes of action under the Fair Labor Standards Act and elaborating on *Gardner-Denver's* rationale); *McDonald v. City of West Branch*, 466 U.S. 284 (1984) (same, with respect to causes of action under 42 U.S.C. § 1983); *Allis-Chalmers v. Lueck*, 471 U.S. 202, 213 n.8 (1985), and *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 412-13 (1988) (same, with respect to state law individual employee rights causes of action); *cf. Atchison, Topeka, & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 565 (1987), and *Hawaiian Airlines v. Norris*, 512 U.S. 246 (1994) (applying similar principles under the Railway Labor Act to hold that individual employees need not utilize the statutory arbitration system created by the RLA to vindicate either federal or state public law individual employee-rights causes of action).

The essential premise of all of these cases is that the collective bargaining process through which Congress determined the exclusive bargaining representative of an employee group would develop and enforce fair working conditions in the absence of governmentally-imposed norms is *not* appropriate to, and was *not* intended to apply to, the increasingly broad range of federal and state public law norms that set minimum working protections for all employees, whether covered by collective bargaining agreements or not. *See Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985), *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987), and *Livadas v. Bradshaw*, 512 U.S. 107 (1993) (all holding that state court causes of action for enforcement of governmentally-required minimum working protections are in no way inconsistent with the collective bargaining process established by the National Labor Relations Act).

The Fourth Circuit—alone of the federal courts of appeals that have addressed the question—has taken the view that this Court in the *Gilmer* decision washed away the foundations of the Court's established *Gardner-Denver* jurisprudence. *Gilmer*, of course, did *not* arise in a collective bargaining agreement setting. And, *Gilmer* simply holds that an individual employee who *herself* agrees to arbitration by a neutral arbitrator, in lieu of court litigation, of any dispute regarding her employment that may arise, is as bound by that promise as any other person who commits in advance to arbitrate a dispute involving interstate commerce.[3] In that regard, *Gilmer* rested on a series of commercial arbitration cases holding that when a person or entity promises another person or entity to arbitrate rather than litigate any dispute that may arise between them, statutory claims are not excepted from that general promise. 500 U.S. at 26, *citing Mitsubishi Motors Corp., supra*; *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987); *Rodriquez de Quijas v. Shearson/American Express, Inc.*, 40 U.S. 477 (1989).

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[3] In *Gilmer*, the arbitration promise was contained in an agreement between the employee and securities exchanges, not in the employee's employment agreement, and was held enforceable under the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.* Because the arbitration agreement in that case was contained in a separate agreement between the plaintiff and the securities exchanges, *Gilmer* left open the question whether the exception to the FAA § 1 for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" applies to all or only some contracts of employment. 500 U.S. at 25 n.2. It is of note that Ceasar Wright's employment as a longshoreman *is* certainly within the FAA exclusion. Consequently, had Mr. Wright not worked under a collective bargaining agreement, it is far from clear that the *Gilmer* holding enforcing a prospective agreement to arbitrate employment discrimination, or other public individual employee right, causes of action would have been applicable.

Despite these critical differences, and even though, as this Court later noted, "*Gilmer* emphasized its basic consistency with [the] unanimous decision in *Alexander v. Garner-Denver Co.*," (*Livadas v. Bradshaw*, 512 U.S. at 127, n.21, *see Gilmer*, 500 U.S. at 33-35 (discussing at some length the reasons for that basic consistency)), the employer-respondents in this case maintain that the Fourth Circuit correctly precluded Ceasar Wright from bringing his ADA case in federal court by reason of the union-employer grievance-arbitration provisions of the collective bargaining agreement here.

Considerations of *stare decisis* are alone sufficient basis to reject the contention that the entire *Gardner-Denver* line of cases should be abandoned and that in *Gardner-Denver*'s place a presumption should be erected that collective bargaining agreement union-employer dispute resolution systems preclude individual employees from pursuing their claims based on a public law individual employee statutory right through the judicial remedial scheme stated in the applicable statute.[4]

The issues here are statutory and Congress has never evidenced an intent to alter the well-settled principle that individual employee rights are not subject to collective-bargained union-employer dispute resolution systems.[5] *See*

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[4] The employer-respondents in this case make what is in essence a preclusion—or, perhaps, a choice of remedies—contention. That contention was definitively rejected in *Gardner-Denver*. It is worth noting, however, that this Court's precedents go further and reject a "prior exhaustion" contention, permitting some form of court litigation after exhaustion and do so without regard to whether the collective bargaining arbitration actually reaches, or has the authority to reach, the statutory cause of action on its merits. *Barrentine*, 450 U.S. at 731 n.4, 732 n.6 (court litigation not precluded even if the statutory claim was submitted to the collective bargaining agreement procedure, nor is an employee who does not submit his claim to the collective bargaining agreement procedure at all barred from bringing his statutory suit in court.)

[5] Both the ADA and the 1991 Civil Rights Act, amending Title VII of the Civil Rights Act of 1964, do contain identical sections providing that "[w]here appropriate and to the extent authorized by law, the use of alternative dispute resolution, including . . .

Patterson v. McClean Credit Union, 491 U.S. 164, 172-73 (1989); *Hilton v. South Carolina Public Railways Comm'n*, 502 U.S. 197, 202 (1981); *Director, OWCP v. Greenwich Colleries*, 512 U.S. 267 (1994); *Hubbard v. United States*, 514 U.S. 65 (1995). Nor has that basic principle generated any practical difficulties of note. *Patterson*, 491 U.S. at 173-174.

To the contrary, that principle has become so embedded in this Court's jurisprudence that altering it would require reconsideration of a number of related questions, including whether statutory limitations periods should be adjusted to permit attempted exhaustion of collectively-bargained procedures (*International Union of Electrical Workers v. Robbins & Mayers*, 429 U.S. 229 (1976)) and whether state law causes of action that are independent of the terms of a collective bargaining agreement are preempted under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (*Lingle*, 486 U.S. at 411 (finding no §301 preemption because "the need to preserve the effectiveness of arbitration" is satisfied as long as "the interpretation of collective bargaining agreements remains firmly in the arbitral realm.")). To foment such widespread instability in well-established law regarding employment relations would create new practical difficulties for employers, employees, and unions seeking to structure their complex relationships with each other.

Most importantly for *stare decisis* purposes, this is decidedly not a situation in which the *Gardner-Denver* line

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arbitration, is encouraged . . ." 42 U.S.C. § 12212 (ADA); Pub. L. No. 102-66, § 118, 105 Stat. 1071, 1081. These vague provisions do not, however, specify whether it *is* "appropriate" or "authorized by law" to require use of collective bargaining agreement grievance-arbitration procedures to adjudicate ADA or Title VII rights. And, the legislative history of both provisions states that the intent was to *preserve*, not displace, this Court's decision in *Gardner-Denver* that it is not "appropriate" to mandate arbitration of Title VII and ADA rights under collective bargaining agreement grievance-arbitration provisions. H.R. Rep. No. 485, 101st Cong., 2nd Sess. (1990), at 76-77 (ADA); H.R. Rep. No. 40, 102nd Cong., 2nd Sess. (1991) at 97 (1991 Civil Rights Act).

of cases is "seriously flawed" (*Hubbard v. United States*, 702 U.S. at 514), or in which there is an "intervening development of the law . . . [which] ha[s] removed or weakened the conceptual underpinnings from the prior decision[s]" (*Patterson*, 491 U.S. at 173). For, as we show in the remainder of this brief, the *Gardner-Denver* precedents are based on a sound understanding of the nature of the collective bargaining system and the role of collectively-bargained union-employer dispute resolution processes in that system, an understanding in no way in tension with *Gilmer* and its predecessor cases enforcing a direct prior arbitration promise by a putitive plaintiff in a court case.

III. THE REQUIREMENT THAT INDIVIDUAL EMPLOYEES UTILIZE COLLECTIVELY-BARGAINED UNION-EMPLOYER GRIEVANCE-ARBITRATION PROCEDURES WHERE THERE IS A CLAIMED VIOLATION OF RIGHTS CREATED BY THE COLLECTIVE BARGAINING AGREEMENT IS ONE BASED ON A COMPLEX OF LABOR LAW POLICY PRINCIPLES THAT HAVE NO APPLICATION TO PUBLIC LAW INDIVIDUAL EMPLOYEE RIGHTS, AND NO RESEMBLANCE TO THE CONTRACT-BASED *GILMER* ARBITRATION REQUIREMENT PRINCIPLE.

A *Gilmer* arbitration promise is a simple promise to substitute arbitration for litigation. The arbitration proceeding is akin to a court proceeding, with a neutral arbitrator performing adjudicatory functions essentially like those performed by a judge. Agreement to this type of alternate dispute resolution method does not, therefore, inherently limit or alter the essential nature of the rights committed to the arbitration forum—claims concerning those rights will be adjudicated on the claiming party's initiative by a neutral, uninvolved decisionmaker and, if found valid, will be enforced. *Gilmer*, 500 U.S. at 26, quoting *Mitsubishi, supra*, ("'[b]y agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to resolution in an arbitral, rather than a judicial, forum.")

Collectively-bargained union-employer grievance-arbitration systems, in contrast, are a "substitute for industrial strife," *not* a "substitute for litigation." *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 578 (1960). And, precisely because that is so, just as a strike over an employment dispute is a *collective action of the employee group through their union*, so too is the grieving and arbitrating of an employment dispute through the collective bargaining agreement dispute settlement process. The union acting, for and on behalf of, the entire bargaining unit controls the prosecution of the claim and determines whether the claim is to be pressed to arbitration or settled either in its own terms or through a process of negotiation involving kindred pending claims or putative claims. And, throughout the process the union proceeds by taking into account the employee group's entire working situation. In all these regards the collective bargaining agreement dispute resolution system is well-suited to its purpose as a means of effectuating the employee group's collective rights in a peaceful way rather than through industrial strife. By the same token such systems are not aimed at and are not well-suited to the very different task of substituting for court litigation of public law individual employee rights claims. Thus, to read a collectively bargained union-employer dispute resolution provision as a *Gilmer* arbitration agreement for and on behalf of every bargaining unit employee covering the employees' public law individual employee rights claims is to distort the collectively bargained provision beyond all recognition.

(1) In the absence of any broad governmental response to the dilemma Chief Justice Taft outlined in *American Steel Foundaries, supra*, the initial corrective response was concerted activity:

> [L]abor organizations . . . were organized out of the necessities of the situation. . . . Union was essential to give laborers opportunity to deal on equality with their employer. They united to exert influence upon him and to leave him in a body in order by this inconvenience to induce him to make better terms with them. [257 U.S. at 209.]

The "terms" which were thus induced evolved into the modern collective bargaining agreement, enforceable under federal law in order "to promote industrial stabilization." *Warrior & Gulf Nav. Co.*, 363 U.S. at 578. And, because the parties to that agreement—the union and the employer—are by force of circumstances and of law involved in a continuing, complex relationship, their agreements "cover[] the whole employment relationship" and "call[] into being a new common law—the common law of a particular industry or a particular plant" as the means of "erect[ing] a system of industrial self-government." *Id.* at 579-580; *see also Teamsters v. Oliver*, 358 U.S. 283, 295 (1959) ("The goal of federal labor policy . . . is . . . to encourage the employer and the representative of the employees to establish, through collective negotiation, their own charter for the ordering of industrial relations, and thereby to minimize industrial strife"); *Local 174, Teamsters v. Lucas Flour*, 369 U.S. 95, 105 (1962).

The collectively-bargained grievance-arbitration system, in its turn, is "[a] major factor in achieving industrial peace," because it provides a means of peaceably administering the self-governmental system created by the collective bargaining agreement rather than "leaving each and every matter subject to a temporary resolution dependent solely upon the relative strength, at any given time, of the contending forces." *Warrior & Gulf Nav. Co.*, 363 U.S. at 580. Thus, "arbitration of labor disputes under collective bargaining agreements" is "part and parcel of the collective bargaining process itself." *Id.* at 578. "The processing of disputes through the grievance machinery"—of which arbitration is a part—"is actually a vehicle by which meaning and content are given to the collective bargaining agreement . . . [as] a part of the continuous collective bargaining process." *Id.* at 581.

As such, arbitration in the labor context is both a method of enforcing pre-established rights and "the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally

accord with the variant needs and desires of the parties." *Warrior & Gulf Nav. Co.*, 363 U.S. at 581; *see also, e.g., Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368, 378; *Paperworkers v. Misco*, 484 U.S. at 38. And, given the nature of the process, the rights-enforcing and private-lawmaking functions are often intertwined in even the most mundane grievances.

All that being so, "[t]he labor arbitrator performs functions which are not normal to the courts," and "the considerations which help him fashion judgments may indeed be foreign to the competence of courts." *Warrior & Gulf Nav. Co.*, 363 U.S. at 581. The arbitrator's resolution of the dispute is expected to "reflect not only what the contract says but . . . such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished." *Id.* at 582. For that reason, an important consideration in the arbitrator's selection will often be his familiarity with "the practices of the industry and the shop." *Id. See* Jet. App. 44a.

In all these respects, of course, a collective bargaining agreement arbitrator has everything to do with proper effective of the agreement's "system of private law" (*Warrior & Gulf Nav. Co.*, 363 U.S. at 581) and nothing to do with the adjudication of public law individual employee rights.

(2) The above analysis indicates that the policy of the federal labor laws favoring enforcement of collectively-bargained union-employer grievance-arbitration provisions is predicated upon the need to foster flexible administration of contractually-created norms by the parties to the collective bargaining relationship, *i.e.*, by the union and the employer. It follows that this policy is limited to the enforcement of such rights, express and implied. And indeed, the statutory articulation of that policy, § 203(d) of the Labor Management Relations Act, 29 U.S.C.

§ 173(d), expressly so indicates, declaring that the "[f]inal adjustment by a method agreed upon by the parties is . . . desirable" with respect to, and only with respect to, "settlement of grievance disputes *arising over the application or interpretation of an existing collective bargaining agreement*" (emphasis supplied).

As far as we are aware, *every* articulation by this Court of the presumption favoring arbitration under collective bargaining agreements has, consistently with the industrial strife roots of that presumption and with § 203(d), been limited to issues involving the elucidation of the collectively-negotiated, private law agreement. *See, e.g., Warrior & Gulf, Nav. Co. supra; Steelworkers v. Enterprise Wheel & Carriage Corp.*, 363 U.S. 593, 597 (1960) ("an arbitrator is confined to the interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice"); *Paperworkers v. Misco*, 484 U.S. at 36 (emphasis supplied) ("[c]ollective-bargaining agreements commonly provide grievance procedures to settle disputes between union and employer with respect to the interpretation and application of the agreement and require binding arbitration for unsettled grievances. In such cases, . . . the courts play only a limited role when asked to review the decision of an arbitrator.") *AT&T Tech. Inc. v. Communications Workers*, 475 U.S. 643, 650 (1986) ("This presumption of arbitrability for labor disputes recognizes the greater institutional competence of arbitrators in interpreting collective-bargaining agreements, 'furthers the national labor policy of peaceful resolution of labor disputes and thus best accords with the parties' presumed objectives in pursuing collective bargaining.' "); *Nolde Brothers Inc. v. Local No. 358, Bakery & Confectionary Workers Union*, 430 U.S. 243, 253 (1977); *Litton Financial Printing v. NLRB*, 501 U.S. 190, 206 (1991).

Against this background, it is not surprising that this Court's cases articulating the reach of broadly-stated collective bargaining agreement arbitration provisions read those clauses as providing for the arbitration of any aspect of the "common law of the shop" but *not* for the arbitration of issues entirely outside the private system of governance established by the agreement.

In *Warrior & Gulf Nav. Co.*, for example, the grievance-arbitration clause covered "differences . . . as to the meaning and application of the provisions of this Agreement, or . . . *any local trouble of any kind*." 363 U.S. at 576. The Court, as we have seen, viewed this agreement as "a substitute for industrial strife," not litigation (*id.* at 578), and in its extended discussion of the arbitrator's authority remained focused on the authority to elaborate "the industrial common law—the practices of the industry and the shop—[as] . . . part of the collective bargaining agreement although not expressed in it," (*id.* at 582), and the Court never suggested that the determination of external law questions is within a labor arbitrator's ordinary functions. *See also Gateway Coal, supra*, 414 U.S. at 375, 377-78 (arbitration provision covering disputes "as to the meaning and application of the provisions of this agreement . . .[,]matters not specifically mentioned in this agreement . . . [and] any local trouble of any kind" is meant to assure access to arbitration for "unforeseen disagreements that inevitably arise . . . [in which] the labor arbitrator has resort to considerations foreign to the courts"); *Barrentine*, 450 U.S. at 736, 737 (collective bargaining agreement providing that " 'any controversy' between the parties . . . be resolved through the binding contractual grievance procedures" does *not* give rise to a presumption favoring binding arbitration of individual rights arising out of a statute; "[w]hile courts should defer to an arbitral decision where the employee's claim is based on rights arising out of the collective-bargaining agreement, different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers.").

Most recently, in *Hawaiian Airlines, Inc. v. Norris, supra,* the Court construed the RLA statutory provision for the arbitration of disputes that "gro[w] out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions" (45 U.S.C. § 151a), and held that "grievances" does not, in the industrial relations context, connote "disputes . . . based on statutory or common law," but only "disagreements over how to give effect to the bargained-for agreement," including implied terms of the agreement. 512 U.S. at 253-254; *see also id.* at 254 ("The use of 'grievance' to refer to a claim arising out of a [collective bargaining agreement] is common in the labor law context in general," citing *Paperworkers v. Misco, supra*).

In short, this Court has consistently read broad but general language delineating the scope of collective bargaining agreement union-employer grievance-arbitration provisions with the presumption that the intent is to cover all disputes arising out of the private law system established by the parties to the agreement and has not understood such general language as encompassing an intent fundamentally to alter the basic office of such provisions where the alternative to arbitration is not industrial strife but court litigation. That understanding could not be more right.

(3) To be sure, the employer-respondents in this case do seek to overcome the lack of a Ceasar Wright arbitration agreement through the Local 1422-Stevedore Association grievance-arbitration agreement. And, in this regard, the employers point to the *Republic Steel v. Maddox*, 379 U.S. 650, (1965), rule that bargaining unit employees asserting a right under a collective bargaining agreement containing such a grievance-arbitration provision must proceed by filing a grievance and following the contractual dispute settlement system and may not proceed by filing and prosecuting an individual contract action in court.

But *Maddox* recognizes that the bargaining unit employees are *not* parties to the union-employer arbitration agreement in the same way that Mr. Gilmer was party to

an arbitration agreement and that the effect of the collectively bargained union-employer arbitration provision on the employees' right to bring a suit in court is therefore *not* a simple contract law question of the kind presented by a direct individual arbitration agreement. Rather, the *Maddox* rule was derived by the Court from the "national labor policy" in elucidating the scope and limits of the majoritarian regime established by the federal labor laws. The principles governing when an individual employee is required to invoke the collectively bargained union-employer grievance-arbitration system, and when he or she is not, were also developed by this Court, in full recognition that the task is *not* one of applying contract law principles but of reconciling the various strands of the national labor policy. And, those principles, which emphasize the necessity of majoritarian control over the collective bargaining agreement's dispute resolution procedure, mandate the conclusion that such union-employer arbitration provisions do not impinge on the right of employees to bring their individual public law employee right claims to court.

As the statutory exclusive bargaining representative, the Union was chosen by the majority of employees and imbued by the NLRA with authority to enter into a collective bargaining agreement establishing the basic private governance system covering the wages, hours, and terms and conditions of employment of unit employees. 29 U.S.C. §§ 158(a)(5), 158(d), & 159(a). And, to a large but not unlimited degree, national labor policy binds the represented employees to the decisions reached by their exclusive representative in negotiating and administering such collective agreements.

> National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees . . . have the most effective means of bargaining for improvements in wages, hours, and working conditions. The policy therefore extinguishes the individual employee's power to order

> his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees. . . . Thus only the union may contract the employee's terms and conditions of employment, and provisions for processing his grievances. [*NLRB v. Allis-Chalmers Manufacturing Co.*, 388 U.S. 175, 180 (1967).]

Initially, the Court concluded that "federal labor policy requires that individual employees wishing to assert contract grievances must *attempt* use of the contract grievance procedure agreed upon by employer and union as the mode of redress." *Republic Steel v. Maddox*, 379 U.S. at 652. In so doing, the Court emphasized that a "Maddox" suit is "*simply on the contract.*" *Id.* at 657 (emphasis supplied). That the holding in *Maddox* is limited to cases concerning rights created by the system of private law erected by the parties to the collective agreement is clear not only from that emphasis and from the use of the term "grievance," but from the reasons the Court gave for requiring individual employees to attempt to use the contractual procedure.

Those reasons, the Court initially explained, were that:

> Congress has expressly approved contract grievance procedures as a preferred method for settling disputes and stabilizing the "common law" of the plant. LMRA § 203(d). . . . Union interest in prosecuting employees grievances is clear. Such activity complements the union's status as exclusive bargaining representative by permitting it to participate actively in the continuing administration of the contract. . . . A contrary rule would . . . "inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements." [*Maddox*, 379 U.S. at 653.]

And the Court later expanded on the rationale for the *Maddox* exhaustion rule in *Vaca v. Sipes*, 386 U.S. 171 (1967):

> *Since the employee's claim is based upon breach of the collective bargaining agreement*, he is bound

> by the terms of that agreement which govern the manner in which contractual rights may be enforced. *For this reason*, it is settled that the employee must at least attempt to exhaust exclusive grievance and arbitration procedures established by the bargaining agreement. *Republic Steel Corp. v. Maddox*, 379 U.S. 650. [386 U.S. at 184-185 (emphasis supplied).]

To put this observation another way, *Vaca* recognizes that the substantive rights created by the collective agreement and the union-employer grievance-arbitration provisions of the collective agreement addressed to enforcing those rights are two parts of an indivisible *contractual* whole, so that requiring employee resort to the grievance-arbitration system does not alter the individual employee's contract-derived rights. That understanding of the *Maddox* rule, like the understandings stated in *Maddox* itself, has force only with respect to employee rights derived from the express and implied terms of the collective agreement itself.

In short, the reasons for requiring individual employees to utilize collective bargaining agreement grievance-arbitration procedures are *not* grounded, as in *Gilmer*, in the traditional contract principle that " 'having made the bargain to arbitrate, the party should be held to it . . . ." 500 U.S. at 26, *quoting Mitsubishi*, 473 U.S. at 628. Rather, the national labor policy concerns that underlie the *Maddox* rule pertain to the scope of union representation and the nature of the collective bargaining agreement. As such, the *Maddox* requirement that individual employees are bound by those procedures applies *only* where the employee's right derives from collective representation and the collective agreement.

The *Maddox* rule cannot be stretched to cover individual public law employee rights claims for a second closely related reason. As we have emphasized a union-employer grievance-arbitration agreement provision, in contrast to an individual employee *Gilmer* arbitration agreement, both substitutes one forum for another *and* grants the union, as opposed to any individual employee, *control* over the prosecution and settlement of the claim.

That is the case, this Court has stressed, for compelling reasons related to the proper development of the "common law of the shop" under the collective bargaining agreement and to the role union-employee grievance-arbitration systems play in that development by enforcing and elaborating on those agreements so as to promote and stabilize the on-going collective bargaining relationship.

Vaca v. Sipes explains at some length the virtues of a "grievance and arbitration procedure which gives the union discretion to supervise the grievance machinery and to invoke arbitration":

> Through this settlement process, frivolous grievances are ended prior to the most costly and time-consuming step in the grievance procedures. Moreover, both sides are assured that similar complaints will be treated consistently, and major problem areas in the interpretation of the collective bargaining contract can be isolated and perhaps resolved. And finally, the settlement process furthers the interest of the union as statutory agent and as coauthor of the bargaining agreement in representing the employees in the enforcement of that agreement. See Cox, Rights Under a Labor Agreement, 69 Harv. L. Rev. 601 (1956). [386 U.S. at 191.]

In contrast,

> If the individual employee could compel arbitration of his grievance regardless of its merit, the settlement machinery provided by the contract would be substantially undermined, thus destroying the employer's confidence in the union's authority and returning the individual grievant to the vagaries of independent and unsystematic negotiation. Moreover, under such a rule, a significantly greater number of grievances would proceed to arbitration.[6] This would greatly increase the cost of the grievance machinery and could so overburden the arbitration process as to prevent it from functioning successfully. [*Id.* at 191-92, citations omitted.]

The *Vaca* Court went on to stress that a rule permitting individual access to union-employer grievance-arbitration procedures could endanger future negotiation of "detailed grievance and arbitration procedures of the kind *encouraged by LMRA § 203(d)* . . . if the [] power to settle the majority of grievances short of the costlier and more time-consuming steps was limited by a rule permitting the grievant unilaterally to invoke arbitration." 386 U.S. at 192 (emphasis supplied). *See also International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 51 (1979) ("[U]nion discretion is essential to the proper functioning of the collective-bargaining system. Union supervision of employee complaints promotes settlements, avoids processing of frivolous complaints, and strengthens the employee's confidence in the union . . . Without these screening and settlement procedures . . . the costs of private dispute resolution could ultimately render the system impracticable").

The Court in *Vaca* and other cases did recognize that "because these contractual remedies have been devised and are often controlled by the union and the employer, they may well prove unsatisfactory for the individual grievant." 386 U.S. at 185. But, to preserve the virtues of union-controlled access to the grievance-arbitration process, *Vaca* held that employees may bypass the contractual procedures with regard to a "claim . . . based upon breach of the collective bargaining agreement" (*id.* at 184) only if "the employee can prove that the union as bargaining agent breached its duty of fair representation in its handling of the employee's grievances" (*id.* at 186). And, in elucidating the scope of that duty, this Court has preserved a wide breadth of discretion for unions in handling employees' contractual grievances:

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[6] *Vaca* noted that "[u]nder current grievance practices, an attempt is usually made to keep the number of arbitrated grievances to a minimum," and cited statistics showing that in some plants less than one percent of the grievances filed were taken to arbitration. 386 U.S. at 192 n.15.

> Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees . . . The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose . . . [*Humphrey v. Moore*, 375 U.S. 335, 349 (1964); *quoting Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953).]

The union's discretion goes beyond the authority "to sift out wholly frivolous grievances which would only clog the process," so as to leave the union "free to take a position on the not so frivolous disputes" or when "the issue is chiefly between two sets of employees." *Humphrey*, 375 U.S. at 349. For "[t]o remove or gag the union in these cases would surely weaken the collective bargaining and grievance processes." *Id.* at 350. *See also Air Line Pilots v. O'Neill*, 499 U.S. at 78 ("[a]ny substantive examination of the union's performance . . . must be highly deferential, recogniizng the wide latitude . . . need[ed] for the effective performance of the[] [union's] . . . responsibilities.").

Once again, both the reasons for precluding legally-mandated individual access to collectively-negotiated employer-union grievance-arbitration systems and the reasons for giving wide deference to union decisions made regarding the prosecution of claims within that system were developed—and only have force—with regard to individual claims based upon rights derived from the collective agreement itself. Yet, to provide, as in the *Gilmer* situation, for individual employee access and control would fundamentally compromise the nature of collective bargaining agreement grievance-arbitration systems as part of the ongoing collective bargaining process, and would frustrate the purposes of the parties to the collective bargaining relationship in creating such systems. And, absent such an alteration the nature of the collectively bargained arbitration agreement goes far beyond the agreed substitution of an arbitral forum for a judicial forum that does not limit public law rights approved in ***Gilmer***.

* * * *

The sum of the foregoing is that unions and employers have over the years devised collectively bargained grievance-arbitration systems well-adapted to enforcing and elaborating upon the collective and individual rights created through collective bargaining, and this Court has developed a set of legal principles designed to preserve the effectiveness of those systems.

As in this case, those processes are negotiated against an industrial relations background in which terms such such as "grievance" and "matters under dispute" refer to issues arising under the "system of industrial self-government" created by the express terms of the agreement and by the customs and practices that are treated as implied contractual terms. As in this case, the processes provided for are sometimes nothing more than a continuation of the negotiation process, with final decision committed to the parties to the agreement rather than to any form of neutral adjudication (the Seniority Board). *See* pp. 6-7, *supra*. As in this case, those processes ordinarily do not permit individual access to the arbitration process, and may or may not permit individual employee access to earlier stages of the grievance process (here the earlier stages are based on a negotiation model, with the union representative acting as co-decisionmaker). As in this case, those processes tend to provide extremely short deadlines for decisionmaking in order to fulfill the basic function of deterring industrial strife, and tend to prefer arbitrators with experience in the customs and practices of the particular industry or plant, since the function of the arbitrator is to draw upon those customs and practices in elucidating the private law system established by the collective bargaining agreement. And, as in this case, collective bargaining agreement grievance and arbitration procedures almost always provide for union control over the determination which grievances move forward in the process and how.

Those processes are not intended to provide for binding determinations of rights that do not derive from the collectively-negotiated agreement and are unsuited to such determinations. Nothing in *Gilmer* supports committing individual employees' public law rights to a system which does not assure individual access to the neutral adjudicatory forum and individual control over presentation of the case. And, as this Court has long recognized, adjusting the collective bargaining grievance-arbitration process to an individual rights model would so overburden the process as to sap its ability to serve the collective-bargaining related purposes it was designed to serve.

Since there is no basis whatever for reconsidering this Court's well-considered, often-reiterated understanding that "[n]ot all disputes between an employee and his employer are suited for binding resolution in accordance with the procedures established by collective bargaining" (*Barrentine*, 450 U.S at 737), that understanding and the *Gardner-Denver* rule it supports should be reaffirmed.[8]

CONCLUSION

The decision of the United States Court of Appeals for the Fourth Circuit should be reversed.

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[8] We recognize that it is theoretically possible for a union and an employer to enter into a collective bargaining agreement which expressly provides for adjudication of statutory rights, and which expressly permits individual employee access to and control of that process. If such an agreement were negotiated, then the question might arise whether the union's representational authority extends to the modification of individual employee public law rights.

This Court's precedents indicate, we believe, that the union's representational authority does not extend that far. *Gardner-Denver*, 415 U.S. at 51; *Barrentine*, 450 U.S. at 731 n.4, 737-38. But there is no need to address here whether we are correct in that regard.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

CEASAR WRIGHT,
Petitioner,
v.

UNIVERSAL MARITIME SERVICE CORP.;
STEVENS SHIPPING & TERMINAL CO.;
STEVEDORING SERVICES OF AMERICA;
RYAN-WALSH, INC.;
STRACHAN SHIPPING CO.;
CERES MARINE TERMINALS, INC.; and
SOUTH CAROLINA STEVEDORES ASSOCIATION,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit**

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL, THE LABOR POLICY ASSOCIATION, and THE EMPLOYERS GROUP IN SUPPORT OF RESPONDENTS

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26 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICI CURIAE* 2

STATEMENT OF THE CASE 4

SUMMARY OF ARGUMENT 5

ARGUMENT 9

I. THE COURT BELOW PROPERLY HELD THAT A COLLECTIVELY-BARGAINED AGREEMENT TO ARBITRATE ALL DISPUTES ARISING OUT OF AN EMPLOYMENT RELATIONSHIP IS ENFORCEABLE WITH RESPECT TO STATUTORY CLAIMS IN THE SAME MANNER AS THE INDIVIDUALLY-BARGAINED AGREEMENT IN *GILMER* 9

A. Agreements to Arbitrate Employment-Related Disputes Stand on the Same Footing as Other Contracts and Are Enforceable With Respect to Statutory Claims 9

B. An Arbitration Agreement Negotiated and Executed by a Duly-Selected Collective-Bargaining Agent Is Binding on the Employees on Whose Behalf It Was Made 11

II. STRONG FEDERAL POLICIES FAVOR THE ENFORCEMENT OF COLLECTIVELY-BARGAINED AGREEMENTS TO ARBITRATE EMPLOYMENT-RELATED DISPUTES, INCLUDING STATUTORY CLAIMS 14

A. Enforcement of Agreements to Submit Statutory Claims to Arbitration Is Fully Consistent With the EEO Laws' Policy of Protecting Individuals Against Discrimination 14

B. Federal Policies Favoring Enforcement of Voluntary Agreements to Arbitrate Must Prevail Over Outmoded Suspicion of Arbitration 18

CONCLUSION 21

TABLE OF AUTHORITIES

CASES — Page

Air Line Pilots Association, International v. ONeill, 499 U.S. 65 (1991) 17-18
Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) 18, 19
Austin v. Owens-Brockway Glass Container, 78 F.3d 875 (4th Cir.), *cert. denied*, 117 S. Ct. 432 (1996) 3, 5
Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728 (1981) 20
Fairhaven Properties, 314 N.L.R.B. 763 (1994) 14
Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) ..... *passim*
Great Western Mortgage Corp. v. Peacock, 110 F.3d 222 (3d Cir.), *cert. denied*, 118 S. Ct. 299 (1997) 3-4
Hughes Tool Co., 56 N.L.R.B. 981 (1943), *enf'd as modified*, 147 F.2d 69 (5th Cir. 1945) 7
Humphrey v. Moore, 375 U.S. 335 (1964) 8, 18
J. I. Case Co. v. NLRB, 321 U.S. 332 (1944) 12
Livadas v. Bradshaw, 512 U.S. 107 (1994) 4
McKennon v. Nashville Banner Publishing Co., 513 U.S. 352 (1995) 4
Medo Photo Supply Corp. v. NLRB, 321 U.S. 678 (1944) 14
Metropolitan Edison Co. v. NLRB, 460 U.S. 693 (1983) 8, 17
NLRB v. Boss Manufacturing Co., 118 F.2d 187 (7th Cir. 1941) 12
NLRB v. Katz, 369 U.S. 736 (1962) 12
NLRB v. Montgomery Ward & Co., 133 F.2d 676 (9th Cir. 1943) 12
Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965) 11
Securities Industry Association v. Connolly, 883 F.2d 1114 (1st Cir. 1989), *cert. denied*, 495 U.S. 1054 (1990) 8, 21
United Electrical, Radio & Machine Workers v. NLRB, 409 F.2d 150 (D.C. Cir. 1969) 12

TABLE OF AUTHORITIES—Continued

Page

United Steelworkers of America v. American Manufacturing Co., 363 U.S. 564 (1960) 15
United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960) 15
United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960) 15
Vaca v. Sipes, 386 U.S. 171 (1967) 8, 11, 18
WJA Realty Ltd. Partnership, 308 N.L.R.B. 728 (1992) 12

DOCKETED CASES

Albertson's Inc. v. United Food and Commercial Workers Union, Civ. No. 97-35500 (9th Cir.) 4

STATUTES

Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.* 3, 9
Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.* 3
  42 U.S.C. § 12212 15
Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.* 9
National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* 3
  29 U.S.C. § 159(a) 6, 11
Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq.* 17
Section 110 of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, 1081 15
Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185 ..... 10, 15
Section 10(b) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78j(b) 16-17
Section 12(2) of the Securities Act of 1933, 15 U.S.C. § 771(2) 17
Sherman Act, 15 U.S.C. §§ 1-7 16
Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* 3

MISCELLANEOUS Page

The Developing Labor Law (Patrick Hardin ed., 3d ed. 1992) 12

Federal Courts Study Committee, Report of the Federal Courts Study Commitee (1990) 19

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

No. 97-889

CEASAR WRIGHT,
Petitioner,
v.
UNIVERSAL MARITIME SERVICE CORP., *et al.,*
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL, THE LABOR POLICY ASSOCIATION, and THE EMPLOYERS GROUP IN SUPPORT OF RESPONDENTS

The Equal Employment Advisory Council (EEAC), the Labor Policy Association (LPA), and the Employers Group respectfully submit this brief as *amici curiae*.[1] Letters of consent from all parties have been filed with the Clerk of the Court. The brief urges this Court to affirm the decision of the court below and, thus, supports the position of the respondents, Universal Maritime Service Corporation *et al.*

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[1] Counsel for the *amici* authored the brief in its entirety. No person or entity other than the *amici* or their counsel made a monetary contribution to the preparation or submission of the brief.

INTEREST OF THE *AMICI CURIAE*

EEAC is an association of employers formed in 1976 to promote sound programs to end employment discrimination. Its members include more than 300 of the nation's largest private employers. Its directors and officers include many of industry's leading experts on equal employment opportunity and affirmative action. Their combined experience gives EEAC valuable insight into the practical, as well as legal aspects of equal employment opportunity (EEO) policies and practices.

LPA is an organization of the senior human resources officers of more than 250 of the nation's largest companies, collectively employing more than 12 million Americans. Since its founding in 1939, LPA has been concerned exclusively with the development and implementation of laws and public policies affecting human resources practices in the private sector. LPA's mission is to ensure that such laws and policies are sound, practical, and responsive to the needs of the modern workplace.

The Employers Group, headquartered in California, is one of the nation's oldest and largest human resources management associations. It represents nearly 5,000 companies of all sizes in every industry, employing in the aggregate approximately 2.5 million employees. Formerly known as the Merchants & Manufacturers Association and the Federated Employers, the Employers Group has been involved as *amicus curiae* in many significant employment cases.

The *amici's* members are employers subject to the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*; Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*; the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, and other EEO laws, as well as to the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* Many of them have contracts with their employees governing some or all terms and conditions of employment. Some of these contracts have been arrived at through collective bargaining with employee representatives, while others are products of direct dealings with unrepresented employees. Many such contracts contain provisions requiring arbitration of employment-related claims and disputes.

The *amici*'s members have an ongoing interest in preserving the enforceability of agreements calling for arbitration of employment-related disputes, whether arrived at through collective or individual bargaining. Arbitration provides a fair, efficient, and effective means of resolving discrimination claims and other employment-related issues that otherwise would clog the courts. Because of their interest in this subject, the *amici* have filed friend-of-the-court briefs in numerous cases supporting the enforceability of arbitration agreements, as well as many other important issues of employment law.[2]

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[2] For example, EEAC filed briefs supporting mandatory arbitration of statutory discrimination claims in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir.), *cert. denied*, 117 U.S. 432 (1996); and *Great Western Mortgage Corp. v. Peacock*, 110 F.3d 222 (3d Cir.), *cert.*

STATEMENT OF THE CASE

Following a 1992 workplace injury, petitioner Ceasar Wright claimed to be totally and permanently disabled. After he received a quarter-million dollar worker's compensation settlement, however, Wright's condition improved unexpectedly, and he reported to his union hiring hall saying he was ready to return to work. Over the next few days, he worked for several different stevedoring firms on referrals from the union. The firms balked, however, when they learned that Wright had received a large monetary settlement for a total and permanent disability. Relying on provisions of the applicable collective-bargaining agreement, they informed the union that they no longer would accept Wright for employment.

The union protested the stevedoring firms' decision, but neither it nor Wright pursued the matter through the grievance-and-arbitration procedure of the collective-bargaining agreement. Instead, at the union's suggestion, Wright went to a lawyer, with whose assistance he filed a charge of discrimination with the U.S. Equal Employment Opportunity Commission (EEOC) alleging that the firms had discriminated against him in violation of the Americans with Disabilities Act. Upon receipt of a right-to-sue letter from the EEOC, Wright sued in federal court on his ADA claim.

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denied, 118 S.Ct. 299 (1997). LPA filed a brief supporting mandatory arbitration of Fair Labor Standards Act claims in *Albertson's Inc. v. United Food and Commercial Workers Union*, Civ. No. 97-35500 (9th Cir.) (decision pending). The Employers Group has filed *amicus* briefs in *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352 (1995) and *Livadas v. Bradshaw*, 512 U.S. 107 (1994).

The case was referred to a magistrate judge, who recommended that it be dismissed because Wright had failed to submit his claim to arbitration as required by the collective-bargaining agreement. The magistrate judge concluded that the case was controlled by the Fourth Circuit's decision in *Austin v. Owens-Brockway Glass Container*, 78 F.3d 875 (4th Cir.), *cert. denied*, 117 S. Ct. 432 (1996), which holds that a collectively-bargained agreement to arbitrate employment-related claims bars a covered employee from suing on statutory discrimination claims, at least without first exhausting arbitration.

The district court agreed with the magistrate judge and dismissed Wright's lawsuit. On appeal, the Fourth Circuit affirmed the dismissal. Relying on *Austin*, the Fourth Circuit observed that "collective bargaining agreements to arbitrate employment disputes are binding upon individual employees even when the dispute involves a federal cause of action," and that "[w]here such an agreement exists, a failure to process a claim under the agreement precludes a court from exercising jurisdiction." (Pet. App. at 4a). This Court granted *certiorari* on March 2, 1998.

SUMMARY OF ARGUMENT

It is now settled that when an *individual* agrees, as a condition of employment, to submit all employment-related disputes to arbitration, that agreement stands "on the same footing as other contracts" and is enforceable with respect to statutory discrimination claims as well as other disputes. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). The central question in this case is whether the same holds true when a *union* makes such an agreement on behalf of employees it represents. The court below properly concluded that it does.

Under the National Labor Relations Act (NLRA), a union duly selected by a majority of the employees in a unit appropriate for collective bargaining is the exclusive representative of *all* the employees in such unit for the purposes of negotiating and entering into contracts with their employer governing their "rates of pay, wages, hours of employment, or other conditions of employment." 29 U.S.C. § 159(a). Thus, when employees choose a union as their agent, they authorize it to bind them—both collectively and individually—to agreements covering the whole gamut of "terms and conditions of employment."

It is well settled that a procedure for resolving employment-related claims and disputes is a "term or condition of employment"—and thus a mandatory subject of collective bargaining—within the meaning of the NLRA. Accordingly, an agreement to adopt such a procedure lies well within the ambit of subjects on which a union can bind the employeees for whom it speaks.

This Court has recognized that it is perfectly appropriate—and, indeed, consistent with important federal policies—for an employer and an employee to agree in advance, as a condition of employment, to "trade[] the procedures and opportunities for review of the courtroom for the simplicity, informality, and expedition of arbitration" as the means of resolving any disputes that may arise out of their employment relationship, including statutory claims. *Gilmer*, 500 U.S. at 31, *quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

In a unionized setting, however, the only way such an agreement ordinarily can come into being is through collective bargaining, for the NLRA bars employers from dealing directly with union-represented employees over dispute-resolution procedures. *See, e.g., Hughes Tool Co.*, 56 N.L.R.B. 981 (1943), *enf'd as modified*, 147 F.2d 69 (5th Cir. 1945). Yet, under the rule the petitioner seeks in this case, a collectively-bargained agreement to arbitrate statutory claims would be unenforceable against employees who assert such claims, and hence would be of little or no value to the employer.

Thus, the rule petitioner seeks would create an anomaly in employment law. It would make it virtually impossible for union-represented employees and their employers to exercise the same, basic right that the unrepresented employee in *Gilmer* and his employer exercised with this Court's approval—*i.e.*, the right to trade the procedures of the courtroom for the more efficient, less expensive procedures of arbitration with respect to statutory claims.

The petitioner and his *amici* argue that the EEO laws' central policy of protecting individuals against discrimination trumps the NLRA's central policies of majority rule and exclusive representation. But there is no need to decide in this case which of these statutory policies takes precedence, because individuals' substantive rights under the EEO laws can be protected as effectively through arbitration as through judicial processes. As this Court has recognized, an agreement to arbitrate statutory claims does not waive any substantive rights afforded by the EEO laws; it merely submits to their resolution in a different forum. *Gilmer*, 500 U.S. at 26. This is equally true whether the agreement to arbitrate such claims was negotiated individually or collectively.

The union's duty of fair representation under federal labor law stands as a bulwark against any danger that individuals' rights might suffer as a result of their subordination to collective interests under the NLRA. *See Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 705 (1983); *Humphrey v. Moore*, 375 U.S. 335, 342 (1964); *Vaca v. Sipes*, 386 U.S. 171, 177-78 (1967). Thus, majoritarian control over the selection of the forum for resolving employees' job-related complaints and charges is fully compatible with effective protection of their individual, substantive rights under the EEO laws.

At bottom, most of the arguments supporting the petitioner's position in this case rests on the outmoded "suspicion of arbitration" that this Court denounced in *Gilmer*, 500 U.S. at 30. Those arguments run counter to strong federal policies favoring arbitration. The importance of those policies is amplified in the employment context by the explosive growth of employment-law litigation in the federal courts. Congress and the judiciary have long recognized that arbitration can, as one court put it, "serve as therapy for the ailment of the crowded docket." *Securities Indus. Ass'n v. Connolly*, 883 F.2d 1114, 1116 (1st Cir. 1989), *cert. denied*, 495 U.S. 1054 (1990). Given the current, overwhelming federal caseload, such "therapy" has never been more appropriate and necessary.

ARGUMENT

I. THE COURT BELOW PROPERLY HELD THAT A COLLECTIVELY-BARGAINED AGREEMENT TO ARBITRATE ALL DISPUTES ARISING OUT OF AN EMPLOYMENT RELATIONSHIP IS ENFORCEABLE WITH RESPECT TO STATUTORY CLAIMS IN THE SAME MANNER AS THE INDIVIDUALLY-BARGAINED AGREEMENT IN *GILMER*

A. Agreements to Arbitrate Employment-Related Disputes Stand on the Same Footing as Other Contracts and Are Enforceable With Respect to Statutory Claims

In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), this Court held that an arbitration agreement that an individual signed "[a]s a condition of his employment," *id.* at 23, in which he pledged to submit to arbitration any dispute that might arise out of his employment or the termination thereof, was enforceable under the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.*, so as to require him to arbitrate his subsequent claim that his employer violated his rights under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.* In so holding, the Court emphasized that the federal policy underlying the FAA places arbitration agreements "on the same footing as other contracts," 500 U.S. at 24, 33, and makes them enforceable with respect to statutory claims, the same as with respect to other types of claims. *Id.* at 26.[3]

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[3] An exception is made where it is shown that Congress intended to preclude waivers of judicial remedies under a particular statute. *Gilmer*, 500 U.S. at 26. However, after a careful analysis of the text, history, structure and purpose of the ADEA, this Court found no evidence of intent to

The present case involves an arbitration agreement that is generally similar to the one in *Gilmer*.[4] The only significant difference is that, while Gilmer himself signed the document containing his agreement to arbitrate, petitioner Wright was represented by a labor union, which negotiated and executed the arbitration agreement in this case as part of a broader collective-bargaining contract covering Wright and his cohorts. That distinction, however, should not affect the enforceability of the agreement. For, as we show below, an arbitration agreement entered into on behalf of employees by their duly chosen collective-bargaining agent is binding on the individuals the union represents, just as if they had signed the agreement themselves.

Gilmer was an action to enforce an arbitration agreement under the FAA, but collectively-bargained arbitration agreements also are enforceable under Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185. In Section 301 cases, this Court has long held that union-represented employees may not sue in court on claims raising issues covered by a

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preclude waivers of judicial remdies under that statute. *Id.* at 26-36. As discussed *infra* p. 13, a similar analysis of the Americans with Disabilities Act—the statute on which petitioner Wright bases his claim in this case—not only shows it to be devoid of any evidence of congressional intent to preclude such waivers, but in fact contains an express congressional endorsement of arbitration.

[4] As the court below noted, the agreement in this case required arbitration of "all matters affecting wages, hours, and other terms and conditions of employment." (Pet. App. at 4a). In similarly broad language, the agreement in *Gilmer* required arbitration of "any dispute, claim or controversy" arising out of Gilmer's employment. 500 U.S. at 23.

collective-bargaining agreement that contains a grievance and arbitration procedure, at least without exhausting that procedure first. *See Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652 (1965); *Vaca v. Sipes*, 386 U.S. 171, 184 (1967). Thus, the decision of the court below holding that Wright's failure to pursue his claim through the contractual grievance procedure barred his suit in court is consistent with well-established labor law principles.

B. An Arbitration Agreement Negotiated and Executed by a Duly-Selected Collective-Bargaining Agent Is Binding on the Employees on Whose Behalf It Was Made

Section 9(a) of the National Labor Relations Act (NLRA), 29 U.S.C. § 159(a), provides that "[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. . . ."[5] That section embodies two of the NLRA's most important, central concepts. First, it establishes the principle of exclusive representation—*i.e.*, that a union chosen by the majority of the employees in an appropriate unit is the sole bargaining agent for *all* the employees in the unit. Second, it defines the scope of such an agent's authority broadly to encompass all matters relating to "terms or conditions of employment." Within that broad ambit, the union can enter into agreements that are binding not only on itself and the employer, but on all the employees in the unit it represents. *See J. I. Case Co. v. NLRB*, 321 U.S. 332, 338-39 (1944). With respect to such matters, the employer is prohibited from dealing directly with employees, or with any other agent on their behalf. *See NLRB v. Katz*, 369 U.S. 736, 743 (1962).

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[5] A proviso to this section states that "any individual employee or group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect." A further proviso requires that the bargaining representative be given an opportunity to be present at such adjustment." 29 U.S.C. § 159(a).

It has long been recognized that a procedure for resolving employment-related complaints or disputes is a matter falling squarely within the ambit of "terms or conditions of employment." *See United Electrical, Radio & Machine Workers v. NLRB*, 409 F.2d 150, 156 (D.C. Cir. 1969). *See also NLRB v. Montgomery Ward & Co.*, 133 F.2d 676 (9th Cir. 1943); *NLRB v. Boss Mfg. Co.*, 118 F.2d 187 (7th Cir. 1941); *WJA Realty Ltd. Partnership*, 308 N.L.R.B. 728 (1992). Indeed, a leading labor law treatise includes grievance and arbitration procedures in a list of topics that "are now so clearly recognized to be mandatory subjects of bargaining that no discussion is required." *The Developing Labor Law* 885, 885 n. 192 (Patrick Hardin ed., 3d ed. 1992). Consequently, application of long-settled NLRA principles dictates the conclusion that the choice of the forum for resolving any employment-related claims petitioner Wright or his unit colleagues might raise was an issue on which their union, as their exclusive bargaining agent, could make a binding, enforceable contractual commitment on their behalf.

To rule otherwise would destroy the mutuality of obligations on which collective bargaining depends. In labor contracts, a provision for arbitration of disputes typically is a *quid pro quo* for a no-strike/no-lockout clause. Together these provisions are the keys to industrial peace. As such, they are among the most important forms of consideration the parties exchange in entering into such agreements. If an employer cannot enforce a collectively-bargained agreement that all employment-related claims and disputes will be submitted to arbitration, the empoyer plainly will have been denied the benefit of its bargain.

Wright and his *amici*, however, urge this Court, in effect, to carve out an exception to these bedrock NLRA principles. They ask the Court to rule that even if a union is an employee's duly-chosen, exclusive bargaining agent, the union cannot consent on the employee's behalf to an agreement requiring the employee to submit statutory claims to arbitration. Such a rule would create an anomaly in employment law. It effectively would deny union-represented employees and their employers any practical way to do what the unrepresented employee in *Gilmer* and his employer did with this Court's subsequent approval—that is, to "trade[] the procedures and opportunities for review of the courtroom for the simplicity, informality, and expedition of arbitration" as the means of resolving statutory claims. *Gilmer*, 500 U.S. at 31, *quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

Gilmer recognizes that such agreements are entirely legitimate and enforceable when entered into between an *individual* and employer. In a unionized setting, however, individual employees ordinarily cannot enter into such agreements with their employer on their own behalf, because the employer cannot by-pass the union and deal directly with employees on a mandatory subject of collective bargaining without violating the NLRA. *See Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678 (1944); *Fairhaven Properties*, 314 N.L.R.B. 763 (1994). Consequently, *collective* bargaining is the only way in which union-represented employees ordinarily can trade the procedures of the courtroom for the more efficient, less costly processes of arbitration.

Under the rule petitioner seeks in this case, however, employers would have little or no incentive to agree to collectively-bargained arbitration procedures covering statutory claims, because the petitioner's rule would make such agreements unenforceable against individuals who assert such claims. This Court should reject such an anomalous rule and hold instead, in keeping with long-established NLRA principles, that an arbitration agreement executed by an employee's duly-chosen, exclusive bargaining representative is binding on the employee and enforceable like any other contract, just as if the individual signed it personally.

II. STRONG FEDERAL POLICIES FAVOR THE ENFORCEMENT OF COLLECTIVELY-BARGAINED AGREEMENTS TO ARBITRATE EMPLOYMENT-RELATED DISPUTES, INCLUDING STATUTORY CLAIMS

A. Enforcement of Agreements to Submit Statutory Claims to Arbitration Is Fully Consistent with the EEO Laws' Policy of Protecting Individuals Against Discrimination

As this Court recognized in *Gilmer*, strong federal policies support the enforcement of private agreements to arbitrate disputes and claims. 500 U.S. at 25. *Gilmer* emphasized the policies embodied in the FAA, including the policy of putting arbitration agreements "on the same footing as other contracts." *Id.* at 24, 33. In the context of collective bargaining, additional strong policy support for enforcement of such agreements is expressed in Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185, and in this Court's decisions in the *Steelworkers Trilogy*[6] and other cases.

Furthermore, the statute under which petitioner Wright asserted his claim in this case—the Americans with Disabilities Act—expressly declares that:

> Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including . . . arbitration, is encouraged to resolve disputes arising under this chapter.

42 U.S.C. § 12212. Thus, Congress not only has *not* expressed an intent to *preclude* enforcement of agreements to arbitrate claims arising under the ADA, but has expressed affirmative support for arbitration as a means of resolving such disputes. Significantly, Congress enacted the legislation adding this language to the ADA *after* this Court handed down its decision in *Gilmer*.[7]

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[6] *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

[7] The above-quoted language of 42 U.S.C. § 12212 was added to the ADA as Section 110 of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, 1081, which Con-

Petitioner and his *amici* would have this Court treat these strong federal policies favoring enforcement of arbitration agreements—as well as the interrelated NLRA policies of majority rule and exclusive representation—as all being secondary in importance to the EEO laws' policy of protecting individuals against discrimination. But their argument poses a false dichotomy. There is no need to decide in this case which of these federal policies is the more important—or to subordinate one statute's policies to another's—because there is no inherent conflict between them. For the individual rights guaranteed under the EEO laws can be effectuated just as successfully by enforcing agreements to arbitrate as by allowing individuals direct access to the courts.

As this Court has recognized, an agreement to arbitrate statutory claims does not amount to a waiver of any of the substantive rights guaranteed to individuals under the EEO laws. It merely submits to a different forum for their resolution. *Gilmer*, 500 U.S. at 26. An arbitrator can enforce substantive statutory rights as effectively as a judge or jury, and in most cases more quickly and efficiently. This is equally true whether the agreement to arbitrate was made directly by the individual, or by a union on behalf of a group of employees that selected it as their bargaining agent.[8]

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gress passed on October 30, 1991, and President Bush signed into law on November 21, 1991. Thus, *Gilmer* had been the law of the land for over five months when Congress' endorsed arbitration as a means of resolving ADA disputes "[w]here appropriate and to the extent authorized by law."

[8] It also is equally true whether the statutory rights involved arise from the Sherman Act, 15 U.S.C. §§ 1-7; Section 10(b) of the Securities and Exchange Act of 1934, 15 U.S.C.

Furthermore, even if, contrary to this Court's observation in *Gilmer*, a union's agreement to substitute arbitration for courtroom adjudication of statutory claims could properly be characterized as a waiver of individuals' substantive statutory rights, that would not provide a valid ground for denying enforcement of such agreements. For this Court has held that, when employees select a union to represent them, they invest the union with power to waive their statutory rights through the collective bargaining process. *See Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 705 (1983). Indeed, in that case the Court made clear that this authority includes the power to waive not only statutory rights that are collective in nature, such as the right to strike and the right to refuse to cross picket lines, but also to waive protected rights that are individual in nature. *Id.* at 706-07.

As this Court recognized in *Metropolitan Edison*, federal labor law contains a built-in safeguard against any danger that a union's exercise of the authority to waive the rights of those it represents might somehow diminish the substantive protection afforded them by statutes. That protection lies in the duty of fair representation which the law imposes on a union serving as a bargaining agent. *Id.* at 706 n.11 ("[T]he National Labor Relations Act contemplates that individual rights may be waived by the union so long as the union does not breach its duty of good-faith representation."). *See also Air*

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§ 78j(b); the civil provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq.*; or Section 12(2) of the Securities Act of 1933, 15 U.S.C. § 77*l*(2); or the federal equal employment opportunity laws. *See Gilmer*, 500 U.S. at 26, and cases there cited.

Line Pilots Ass'n, Int'l v. O'Neill, 499 U.S. 65 (1991); *Vaca v. Sipes,* 386 U.S. 171 (1967); *Humphrey v. Moore,* 375 U.S. 335 (1964). Thus, there is no inconsistency between the EEO laws' goal of protecting individuals against discrimination in employment and the labor laws' policy of allowing a majority-selected bargaining agent to select the procedural forum in which disputes over such rights will be resolved.

B. Federal Policies Favoring Enforcement of Voluntary Agreements to Arbitrate Must Prevail Over Outmoded Suspicion of Arbitration

Petitioner and his *amici* argue that this Court's decision in *Alexander v. Gardner-Denver Co.,* 415 U.S. 36 (1974), requires reversal of the Fourth Circuit's decision in this case. Contrary to their contentions, however, *Alexander* does not preclude enforcement of a collectively-bargained agreement requiring submission of statutory discrimination claims to arbitration. *Alexander* simply does not address that issue. It merely holds that when an arbitrator has rendered a decision based on wholly contractual claims, that decision does not bar a subsequent Title VII suit to enforce statutory claims. The Court in *Alexander* observed that contractual rights and statutory rights "have legally independent origins and are equally available to the aggrieved employee." 415 U.S. at 52. It stressed that the arbitrator in that case was "confined to the interpretation of the collective bargaining agreement." *Id.* at 53.

Thus, *Alexander* turned on a distinction between contractual claims, which were covered by the applicable arbitration agreement in that case, and statutory claims, which were not. *Id.* at 52-53. It did not address situations like the one in this case, in which an arbitration agreement plainly covers statutory as well as contractual discrimination claims. As the Fourth Circuit noted in *Austin,* this fact alone distinguishes *Alexander,* 78 F.3d at 883 n.2.

Furthermore, as this Court expressly recognized in *Gilmer, Alexander's* marked distrust of labor arbitration as an adequate forum for resolving statutory discrimination claims is out of step with the Court's recent holdings. 500 U.S. at 34 n.5. In light of today's realities, courts simply cannot afford to foreclose the alternative of arbitration. Since 1974, when *Alexander* was decided, cases filed in the federal courts have increased by over 150 percent.[9] Statistics with respect to employment cases are even more glaring. Between 1969 and 1990, employment claims filed in federal court increased by over two thousand percent. Federal Courts Study Committee, Report of the Federal Courts Study Committee 61 (1990). Since 1990, the number of such claims has tripled.[10] To compound matters, increases in the total number of federal judgeships have not kept pace with court filings. In 1974, the number of cases filed per district court judgeship was 358. By 1997, that figure had risen to 480.[11]

Even these dramatic numbers do not tell the full story, however. As Chief Justice Warren Burger recognized some 17 years ago, "people's patience with the judicial system is wearing thin." *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 752 (1981) (dissenting opinion). Thus, as Chief Justice Burger put it, a holding that limits enforceability of a voluntary agreement to arbitrate statutory claims "runs counter to every study and every exhortation of the Judiciary, the Executive, and the Congress urging the establishing of reasonable mechanisms to keep matters of this kind out of the courts." *Id.*

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[9] Source: Statistics Division, Administrative Office of U.S. Courts.

[10] Source: Statistics Division, Administrative Office of U.S. Courts.

[11] Source: Statistics Division, Administrative Office of U.S. Courts.

Arbitration provides an extrajudicial means by which disputes that typically arise in the employment setting can be resolved in a more efficient and less expensive manner, without further burdening our overcrowed court system.

> The reasons favoring arbitration are as wise as they are obvious: litigation is costly and time consuming, and more importantly to the point in this case, judges are less adapted to the nuances of the disputes that typically arise in shops and factories than shop stewards, business agents, and managerial supervisors . . . . By bringing together persons actually involved in the workplace, often assisted by a neutral arbitrator experienced in such matters, disputes are resolved swiftly and cheaply. This mechanism promotes industrial harmony and avoids strikes and conflicts, it provides a swift, fair and inexpensive remedy.

Id. at 747-48.

"Congress passed the Federal Arbitration Act . . . to help legitimate arbitration and make it more readily useful to disputants. The hope has long been that the Act could serve as therapy for the ailment of the crowded docket." *Securities Indus. Ass'n v. Connolly*, 883 F.2d 1114, 1116 (1st Cir. 1989). Viewing the strong endorsements of arbitration by Congress and this Court against the ominous backdrop of the current, overwhelming federal caseload, such "therapy" is more appropriate and necessary now than ever.

CONCLUSION

For the reasons discussed above, the *amici curiae* respectfully submit that the court of appeals' decision dismissing petitioner Wright's Americans with Disabilities Act lawsuit because of his failure to submit his claims to arbitration as required by the collective-bargaining agreement should be affirmed.

Respectfully submitted,

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No. 97-889

IN THE
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CEASAR WRIGHT,
Petitioner,
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UNIVERSAL MARITIME SERVICE CORP., *et. al.*
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICUS CURIAE* OF NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 2

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. ARBITRATION IS A WELL-ESTABLISHED, VITAL ASPECT OF A BROAD RANGE OF LEGAL RELATIONSHIPS 4

  A. This Court Has Emphasized The Broad Federal Policy Favoring Arbitration 4

    1. This Court Repeatedly Has Embraced Arbitration 4

    2. The Broad Federal Policy Favoring Arbitration Includes Resolution Of Claims Founded on Statutory Rights 7

    3. The Broad Federal Policy In Favor Of Arbitration Includes Arbitration In The Collective Bargaining Context 8

B. Arbitration Provisions Play A Critical Role In Labor Relations 9

II. ARBITRATION PROVISIONS IN COLLECTIVE BARGAINING AGREEMENTS SHOULD BE ENFORCED 11

A. The Capacity of Arbitrators and the Arbitration Process Is Not A Valid Reason To Deny Enforcement Of An Arbitration Provision 13

B. The Nature Of The Collective Bargaining Process Provides A Strong Basis For Enforcement Of Arbitration Provisions 14

C. This Court's Decision In *Gardner-Denver* Does Not Preclude Arbitration 19

CONCLUSION 23

TABLE OF AUTHORITIES

Cases	Page
Abood v. Detroit Board of Education, 431 U.S. 209 (1977)	16
Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974)	3, 11,20
Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985)	14
Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728 (1981)	20
Bercovitch v. Baldwin School, Inc., 133 F.3d 141 (1st Cir. 1998)	12
Bolden v. Southeastern Pennsylvania Transportation Authority, 953 F.2d 807 (3d Cir. 1991), *cert. denied*, 504 U.S. 543 (1992)	15
Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235 (1970)	15
Brown v. Pro Football, Inc., 518 U.S. 231 (1996)	2
Chicago Teachers Union v. Hudson, 475 U.S. 292 (1986)	16
Clayton v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, 451 U.S. 679 (1981)	17-18
Crawford-El v. Britton, 118 S. Ct. 1584 (1998)	20
Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213 (1985)	5
DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983)	18
Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991)	*passim*
Livadas v. Aubry, 510 U.S. 1083 (1994)	2

McDonald v. City of West Branch, 466 U.S. 284 (1984) 20
McWilliams v. Logicon, Inc., No. 97-3190, 1998 U.S. App. LEXIS 8445 (10th Cir. May 1, 1998) 6, 12
Miller v. Public Storage Management, Inc., 121 F.3d 215 (5th Cir. 1997) 12
Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) .... *passim*
Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1 (1983) 3, 6
National Posters, Inc. v. NLRB, 494 U.S. 1026 (1990) 2
Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965) 18
Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989) .... *passim*
Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974) .. 5
Shearson/American Express Inc. v. McMahon, 482 U.S. 220 (1987) .... *passim*
Textile Workers Union of America v. Lincoln Mills of Alabama, 353 U.S. 448 (1957) 6, 18
United Paperworkers International Union, AFL-CIO v. Misco, Inc., 484 U.S. 29 (1987) 6, 21
United States v. Stanley, 483 U.S. 669 (1987) 20
United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960) 9, 17
United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960) .... *passim*
Wilko v. Swan, 346 U.S. 427 (1953) 5
Willmar Electric Service, Inc. v. NLRB, 507 U.S. 909 (1993) 2

Statutes

9 U.S.C. § 1 *et seq.* 4
9 U.S.C. § 3 21
29 U.S.C. § 159 18
Public Law No. 101-336, 104 Stat. 327 (1990) 12

Miscellaneous

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BRIEF *AMICUS CURIAE* OF NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF RESPONDENTS

The National Association of Manufacturers respectfully submits this brief as *amicus curiae* in support of respondents.[1]

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[1] The parties have consented to the filing of this brief. Copies of the letters of consent have been filed with the Clerk of the Court. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than the *amicus curiae*, its members, and its counsel, made a monetary contribution to the preparation and submission of this brief.

INTEREST OF *AMICUS CURIAE*

The National Association of Manufacturers ("NAM") is the oldest and largest broad-based industrial trade association in the United States. Its nearly 14,000 member companies and subsidiaries, including 10,000 small manufacturers, employ approximately eighty-five percent of all manufacturing workers and produce over eighty percent of the nation's manufactured goods. More than 158,000 businesses are affiliated with the NAM through its Associations Council and National Industrial Council.

The NAM and these councils are vitally interested in the reasonable and fair enforcement of workplace laws, so as: (1) not to impair the ability of manufacturers to compete in the world market; (2) to ensure equal footing with other types of employers; and (3) to secure the benefits of such laws for employees of the NAM's members. To this end, the NAM has filed amicus briefs in various cases involving workplace issues, including *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996), *Livadas v. Aubry*, 510 U.S. 1083 (1994), *Willmar Electric Service, Inc. v. NLRB*, 507 U.S. 909 (1993), and *National Posters, Inc. v. NLRB*, 494 U.S. 1026 (1990).

American employers have a vital interest in the legal question presented by this case – the legal standards governing the enforceability of arbitration provisions in collective bargaining agreements. The outcome of this case accordingly will have a substantial impact on the NAM's members.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court repeatedly has recognized the strong federal policy favoring enforcement of arbitration provisions. In its modern decisions, the Court has established that arbitration is something to be embraced rather than resisted; that it is an alternative forum to court, not a derogation of rights; and

that it is a significant solution to problems of delay and overcrowding in our nation's courts. Consistent with well-settled principles, the Court once again should hold that the disputed arbitration provisions should be enforced. There is no valid basis for a special rule exempting the arbitration provisions at issue from the general principles governing arbitration provisions.

Certain cardinal points are, by now, indisputable. It is clear that, contrary to the judicial hostility that existed at common law, arbitration provisions now are generally enforceable. *See, e.g., Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983). It is clear that, outside the collective bargaining context, arbitration provisions that concern statutory rights likewise are generally enforceable. *See, e.g., Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989). It is clear that arbitrable statutory claims include claims asserted under federal employment and discrimination statutes. *See, e.g., Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). And it is clear that arbitration provisions in collective bargaining agreements should be rigorously enforced, at least with regard to non-statutory claims. *See, e.g., United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960).

The question in this case is whether there should be a special exception from these principles for one category of arbitration clauses – those found in collective bargaining agreements, and which mandate arbitration of claims grounded in federal statutes. Petitioner's principal justifications – the asserted incapacity of arbitrators and arbitration to address the kinds of claims at issue; the special context of collective bargaining; and this Court's decision in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) – fall far short of establishing an exception to the general rule of arbitrability of disputes. Indeed, the particular issue before the Court – whether an arbitration provision should be given effect to require submission by a union member of his workplace dispute to an agreed arbitral forum – was not even presented in *Gardner-Denver*, a case in which the question before the Court was the effect to be given an arbitration decision.

Just as the Court in the past has repeatedly enforced arbitration provisions in a wide variety of contexts, so too the Court should enforce arbitration provisions in this context.

ARGUMENT

I. ARBITRATION IS A WELL-ESTABLISHED, VITAL ASPECT OF A BROAD RANGE OF LEGAL RELATIONSHIPS

A. This Court Has Emphasized The Broad Federal Policy Favoring Arbitration

As this Court repeatedly has emphasized, dispute resolution through arbitration is a recognized and established component of many relationships, and serves important public policies and goals.

1. This Court Repeatedly Has Embraced Arbitration

This Court has made clear that enforcement of arbitration provisions should be encouraged. In doing so, it has repeatedly had to overcome an outmoded judicial presumption against arbitration, and, indeed, a judicial hostility to arbitration. More than seventy years ago, Congress enacted the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, "to overcome an anachronistic judicial hostility to agreements to arbitrate, which American courts had borrowed from English common law." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 n.14 (1985). The Court has emphasized that "we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution." *Id.* at 626-27.[2]

Even since enactment of the FAA, however, this Court has been forced repeatedly to overcome a judicial inclination against arbitration. In *Wilko v. Swan*, 346 U.S. 427 (1953), for example, the Court initially declined to enforce an arbitration agreement regarding the Securities Act of 1933; more recently, the Court emphasized that *Wilko* itself rested on an unjustified skepticism of arbitration. "[T]he mistrust of arbitration that formed the basis for the *Wilko* opinion . . . is difficult to square with the assessment of arbitration that has prevailed since that time." *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 233 (1987). Indeed, the Court ultimately overruled *Wilko*'s holding regarding the non-enforcement of arbitration provisions concerning the Securities Act, and found explicitly that "[t]he Court's characterization of the arbitration process in *Wilko* is pervaded by what Judge Jerome Frank called the 'old judicial hostility to arbitration.'" *Rodriguez de Quijas*, 490 U.S. at 480. The Court emphasized that *Wilko*'s "suspicion of arbitration as a method of weakening the protections afforded in the substantive law" is "far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes." *Id.* at 481. The Court particularly castigated "the outmoded presumption of disfavoring arbitration proceedings." *Id.*

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[2] *See also, e.g., Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219-21 & n.6 (1985); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510 & n.4 (1974) (Act was intended to "revers[e] centuries of judicial hostility to arbitration agreements").

Two federal statutes repeatedly have informed the Court's acceptance of arbitration in the past, and again should do so here. The FAA establishes a broad "federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24.[3] The Labor Management Relations Act ("LMRA") likewise reflects a strong policy favoring arbitration agreements. The Court has found it "clear . . . that Congress [in the LMRA] adopted a policy which placed sanctions behind agreements to arbitrate grievance disputes, by implication rejecting the common-law rule . . . against enforcement of executory agreements to arbitrate." *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448, 456 (1957). Arbitration "is the substitute for industrial strife," and "arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself." *Warrior & Gulf Navigation Co.*, 363 U.S. at 578.

Together, the FAA and the LMRA establish cognate policies strongly supporting arbitration. Indeed, this Court has applied decisions under both statutes in explaining the broad federal policy favoring arbitration. *See, e.g., Mitsubishi Motors*, 473 U.S. at 626 (invoking, in an FAA context, the *Steelworkers* LMRA decisions in explaining the "federal substantive law of arbitrability" and corresponding "body of law"); *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 40 n.9 (1987) ("the federal courts have often looked to the [FAA] for guidance in labor arbitration cases"). Taken together, Congress's endorsement of arbitration in these statutes and this Court's decisions construing the FAA and the LMRA reflect the broad federal policy favoring enforcement of arbitration provisions.

2. The Broad Federal Policy Favoring Arbitration Includes Resolution Of Claims Founded On Statutory Rights

The broad federal policy favoring arbitration extends to resolution of claims founded on statutory rights. Thus, in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), the Court found that an arbitration provision should be enforced regarding Sherman Act claims; in *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987), the Court found that an arbitration provision should be enforced regarding the Securities and Exchange Act of 1934 and the Racketeer Influenced and Corrupt Organizations Act ("RICO"); and, in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989), the Court found that an arbitration provision should be enforced regarding the Securities Act of 1933. The Court has emphasized that the "duty to enforce arbitration agreements *is not diminished* when a party bound by an agreement raises a claim founded on statutory rights." *McMahon*, 482 U.S. at 226 (emphasis added). Indeed, the Court has stated that "[t]here is no reason to depart from these guidelines where a party bound by an arbitration agreement raises claims founded on statutory rights." *Mitsubishi Motors Corp.*, 473 U.S. at 626.

The Court similarly has applied the presumption in favor of arbitration provisions in the context of claims regarding employment and discrimination statutes. In *Gilmer*, the Court held that the same framework which applies to arbitration provisions concerning other statutory claims also applies to arbitration provisions concerning employment and discrimination statutes, including claims under the Age Discrimination in Employment Act ("ADEA"). The Court explained that "[i]t is by now clear that statutory claims may be the subject of an arbitration agreement." *Id.* 500 U.S. at 26. The Court specifically rejected the argument that "compulsory arbitration of [such] claims pursuant to arbitration agreements would be inconsistent with the statutory framework and purposes of the ADEA." *Id.* at 27.

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[3] Numerous courts have held that the FAA applies both to employment contracts and to collective bargaining agreements. *See, e.g., McWilliams v. Logicon, Inc.*, No. 97-3190, 1998 U.S. App. LEXIS 8445, at *6 (10th Cir. May 1, 1998) (citing cases). Some courts, however, have reached a contrary conclusion. *Id.*

3. The Broad Federal Policy In Favor Of Arbitration Includes Arbitration In The Collective Bargaining Context

This Court also has recognized the general policy in favor of arbitration in the context of collective bargaining agreements and the LMRA. The Court has emphasized, in this context, the "congressional policy in favor of settlement of disputes by the parties through the machinery of arbitration." *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. at 582. For this reason, the Court has stressed a strong presumption in favor of finding disputes to be arbitrable under a collective bargaining agreement: "[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. *Doubts should be resolved in favor of coverage.*" *Id.* at 582-83 (emphasis added). Thus, just as the Court has recognized a broad policy favoring enforcement of arbitration provisions outside the collective bargaining context, so too the Court has recognized a broad policy favoring enforcement of arbitration provisions within the collective bargaining context.

Accordingly, it is indisputable that: (1) this Court repeatedly has overcome judicial hostility to arbitration; (2) the broad federal policy favoring arbitration encompasses statutory claims, including claims based on employment and discrimination statutes; and (3) the broad federal policy favoring arbitration includes arbitration in the collective bargaining context.

B. Arbitration Provisions Play A Critical Role In Labor Relations

Particularly in light of the clear federal policy favoring enforcement of arbitration provisions, it is important to emphasize that enforcement of arbitration provisions is an essential element of labor relations.

Arbitration now plays an essential role in resolving disputes.[4] Arbitration provisions are common in the workplace, both in the collective bargaining arena and in non-collective bargaining contexts.[5] Arbitration provisions serve many salutary purposes in the workplace. They provide a swift, inexpensive method of dispute resolution and avoid divisive industrial strife. *See Gilmer,* 500 U.S. at 28; *Warrior & Gulf,* 363 U.S. at 582-83; *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960).

It should be emphasized that arbitration is a neutral process, which does not favor one party or the other. *See generally* Frank Elkouri & Edna Asper Elkouri, *How Arbitration Works* (5th ed. 1997). For example, arbitration does not favor employers: arbitrators are perfectly capable of ruling against employers.[6] Nor does it favor high-income workers over low-income workers. Because arbitration facilitates greater access to dispute resolution, some have emphasized that arbitration may be particularly helpful to lower-income workers.[7]

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[4] In 1997 alone, over 78,000 arbitrations were conducted under the auspices of the American Arbitration Association. *See* American Arbitration Association, *The American Arbitration Association Implements the Smart Solution, A New Three Step Dispute Resolution Program to Resolve Disputes With Its Employees* (visited June 25, 1998) <http://www.adr.org/press/smart_ solution.html>.

[5] For example, 96% of collective bargaining agreements contain arbitration clauses covering discrimination claims. *See* The Bureau of National Affairs, *Basic Patterns in Union Contracts* 131-32 (13th ed. 1992).

Employers, employees, unions, and others routinely participate in a broad range of arbitration proceedings. As this Court's repeated pronouncements embracing arbitration indicate, stereotypes of arbitrators and arbitration are unfounded. As this Court has emphasized, there is no basis for a wholesale condemnation of the process. Sweeping denunciation of the adequacy of arbitration and arbitrators reflects the distrust of the arbitral process that this Court has had to overcome in implementing the broad federal policy favoring enforcement of arbitration provisions.

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[6] *See generally, e.g.*, Mark Berger, *Can Employment Law Arbitration Work?*, 61 U. Mo. L. Rev. 693, 714 (1993) (explaining that "the experience in the labor arbitration arena suggests that the arbitration process is more than able to produce plaintiff victories where the claims are justified").

[7] A bipartisan, blue-ribbon governmental commission appointed by the Secretary of Labor and Secretary of Commerce recently concluded:

> [C]ourt litigation has become a less-than-ideal method of resolving employees' public law claims. . . . [E]mployees bringing public law claims in court must endure long waiting periods as governing agencies and the overburdened court system struggle to find time to properly investigate and hear the complaint. Moreover, the average profile of employee litigants . . . indicates that lower-wage workers may not fare as well as higher-wage professionals in the litigation system; lower-wage workers are less able to afford the time required to pursue a court complaint, and are less likely to receive large monetary relief from juries.

Department of Labor and Department of Commerce, Commission on the Future of Worker-Management Relations, *Report and Recommendations* 30 (Dec. 1994).

II. ARBITRATION PROVISIONS IN COLLECTIVE BARGAINING AGREEMENTS SHOULD BE ENFORCED

Particularly in light of the broad federal policy favoring arbitration, arbitration provisions in collective bargaining agreements should be given effect, including provisions that reach claims based on statutory rights. As explained, under this Court's precedents it is clear that: (1) an arbitration provision concerning statutory claims outside the collective bargaining context must be given effect; and (2) an arbitration provision concerning non-statutory claims within the collective bargaining context must be given effect. An arbitration provision concerning statutory claims within the collective bargaining context likewise should be given effect.

This Court has emphasized that a party objecting to the applicability of an arbitration agreement has the burden of establishing the inapplicability of the arbitration provision. "The burden is on the party opposing arbitration . . . to show that Congress intended to preclude" the arbitral forum. *McMahon*, 482 U.S. at 227; *see also Gilmer*, 500 U.S. at 26. That burden here rests squarely upon the petitioner. In attempting to meet this burden, petitioner raises three principal arguments in contending that arbitration should be unavailable for statutory claims in the collective bargaining arena: (1) arbitrators and the arbitration process are unsuited for resolution of such issues; (2) the nature of collective bargaining renders arbitration of such issues inappropriate; and (3) this Court's decision in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) purportedly precludes arbitration of statutory claims in the collective bargaining context. None of these contentions is meritorious. None is sufficient, moreover, to preclude operation of two cardinal principles established by this Court – that the mandatory arbitration of statutory claims, including employment and discrimination claims, is permissible; and that the mandatory arbitration of claims in the collective bargaining context is permissible.[8]

In considering these points, it also is important to emphasize precisely what is at issue in this case – whether a party whose collective bargaining agent bargained for (and obtained) a contract clause compelling arbitration may be held to that agreement. Although petitioner raises a wide range of additional issues (such as the effect to be given such an arbitration in a subsequent judicial proceeding), the only issue before the Court is the threshold, crucially important, straightforward question – whether a binding arbitration provision in a collective bargaining agreement should be enforced regarding statutory claims, as it unquestionably would be *outside* the collective bargaining context, and as it unquestionably would be *within* the collective bargaining context for non-statutory claims. Just as this Court repeatedly has rejected efforts to hobble enforcement of arbitration provisions in other contexts, so too the Court should reject such an effort here, and should reiterate, once again, the broad federal policy favoring arbitration.

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[8] With regard to petitioner's claims concerning the statutory text and legislative history of the Americans With Disabilities Act ("ADA"), *amicus* agrees with respondents that the ADA permits mandatory arbitration. *See* Pub. L. No. 101-336, 104 Stat. 327 (codified at 42 U.S.C. § 12212 (1990)); *see also McWilliams v. Logicon, Inc.*, 1998 U.S. App. LEXIS 8445; *Bercovitch v. Baldwin School, Inc.*, 133 F.3d 141 (1st Cir. 1998); *Miller v. Public Storage Management, Inc.*, 121 F.3d 215 (5th Cir. 1997).

A. The Capacity Of Arbitrators And The Arbitration Process Is Not A Valid Reason To Deny Enforcement Of An Arbitration Provision

Petitioner suggests that arbitrators and the arbitration process render enforcement of an arbitration provision inapplicable in the collective bargaining process. The short answer to this objection is that it is precisely the kind of objection that repeatedly has been urged in favor of judicial hostility to arbitration provisions – and precisely the kind of objection that this Court repeatedly has rejected. The reasons for rejecting the objection in other contexts are fully applicable here.

For example, in *Mitsubishi Motors v. Soler Chrysler-Plymouth*, the Court overrode objections to arbitrating a complex claim under the federal antitrust statutes. The Court emphasized that "potential complexity should not suffice to ward off arbitration." 473 U.S. at 633. The Court further stressed that "adaptability and access to expertise are hallmarks of arbitration." *Id.* In *Shearson/American Express Inc. v. McMahon*, the Court likewise emphasized that "a general suspicion of the desirability of arbitration and the competence of arbitral tribunals" applies "with no greater force to the arbitration of securities disputes than to the arbitration of legal disputes generally." 482 U.S. at 231. The Court reiterated the *Mitsubishi* holding that "arbitral tribunals are readily capable of handling the factual and legal complexities of antitrust claims, notwithstanding the absence of judicial instruction and supervision," and that "the streamlined procedures of arbitration do not entail any consequential restriction on substantive rights." *Id.* at 232. The Court explicitly rejected the challenge to "the competence of arbitral tribunals." *Id.* In *Gilmer*, moreover, the Court squarely rejected "a host of challenges to the adequacy of arbitration procedures." 500 U.S. at 30. The

Court emphasized that the challenges reflect "generalized attacks on arbitration" of a type that the Court repeatedly has rejected. *Id.*[9]

Accordingly, the objection that the resolution of the claims at issue is inappropriate for arbitration and arbitrators is inadequate to preclude arbitration. This Court has rejected such arguments repeatedly, and should do so here as well.

B. The Nature Of The Collective Bargaining Process Provides A Strong Basis For Enforcement Of Arbitration Provisions

Petitioner contends that the nature of the collective bargaining process itself provides a basis for refusing to enforce an arbitration provision in a collective bargaining agreement. In fact, just the opposite is true. It is indisputable that a collective bargaining agreement appropriately may include provisions for the arbitration of non-statutory claims. Nothing about the collective bargaining context supports a categorical rule precluding arbitration of statutory claims. Here, as elsewhere, the party asserting preclusion has the burden of establishing preclusion, and may do so only by establishing a congressional intent in the pertinent statute. *See Gilmer*, 500 U.S. at 26. Petitioner cannot meet this burden.

This Court repeatedly has emphasized the propriety and enforcement of arbitration provisions in collective bargaining agreements. *See, e.g., Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 219 (1985) (emphasizing "the central role of arbitration in the collective bargaining context"); *Warrior & Gulf Navigation Co.*, 363 U.S. at 578 ("arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself"); *id.* at 581 ("[a]part from matters that the parties specifically exclude, all of the questions on which the parties disagree must . . . come within the scope of the grievance and arbitration provisions of the collective agreement"); *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 252 (1970) (noting "the importance that Congress has attached" to arbitration, and the "central" role of arbitration in "the administration of collective bargaining agreements") (internal citations omitted). Petitioner contends, nevertheless, that the central and positive role arbitration plays in the collective bargaining context is inapplicable when statutory claims are at issue. As with other objections that have been raised to arbitration provisions in various contexts, however, this objection is untenable.

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[9] Indeed, the expertise and experience of arbitrators is one of the noted benefits of the arbitral process. *See generally* Frank Elkouri & Edna Asper Elkouri, *How Arbitration Works* 198-201 (5th ed. 1997).

Most fundamentally, the objection is based on a misconception. An arbitration provision involves a designation of forum, not a surrender of a claim. As this Court has emphasized, "[b]y agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute." *Gilmer*, 500 U.S. at 26 (*citing Mitsubishi Motors Corp.*, 473 U.S. at 628). Again and again, the Court has rejected this argument: "the streamlined procedures of arbitration do not entail any consequential restriction on substantive rights." *McMahon*, 482 U.S. at 232.

Indeed, it is well-established that unions may make binding agreements with regard to a broad range of important legal rights. For example, it has been held that a public employees' union permissibly may agree, as the agent for its members, that the members will submit to drug tests, notwithstanding possible Fourth Amendment objections. *See, e.g., Bolden v. Southeastern Penn. Transp. Auth.*, 953 F.2d 807, 827 (3d Cir. 1991), *cert. denied*, 504 U.S. 543

(1992). Moreover, this Court has held that the legislative assessment of the value of the "union shop" – in which the union may act for employees as a whole, even if individual employees object – is so important that it justifies any resulting impingement on the constitutional right to freedom of association. *See Chicago Teachers Union v. Hudson*, 475 U.S. 292, 302-03 (1986); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 222 (1977).

Petitioner's objection would cause a bizarre bifurcation in the procedures available for enforcing employees' statutory rights, depending on whether the employee were subject to a collective bargaining agreement. Consider two employees with identical age discrimination claims. Under petitioner's approach, a non-union employee subject to a binding arbitration provision would be bound to arbitrate (per *Gilmer*), while a union employee subject to a binding arbitration provision would not. In other contexts, this Court has emphasized that interpretations of principles governing arbitration provisions should not lead to such anomalous and inconsistent results. *See, e.g., Rodriguez de Quijas*, 490 U.S. at 485 (inconsistent result with regard to the enforceability of an arbitration provision "makes little sense for similar claims, based on similar facts"). No such inconsistency should be created here. Indeed, it would be especially inappropriate to permit such inconsistency where the existence of a collective bargaining agreement would render an arbitration provision *less* enforceable – in light of the established, central role for arbitration provisions in collective bargaining agreements. It is especially difficult to imagine that Congress and this Court would intend that, as between the two hypothetical workers described above, the contract formed as a result of collective bargaining would be avoidable by the worker, while the contract formed by the individual employee would not.

This Court also has emphasized the broad federal policy favoring arbitration in the collective bargaining context itself, and distinguished precedent evoking judicial hostility to arbitration (which the Court subsequently overruled). *See Warrior & Gulf Navigation Co.*, 363 U.S. at 578 (distinguishing *Wilko*, which was later overruled by *Rodriguez*, and finding that *Wilko*'s skepticism of arbitration should not preclude broad federal policy favoring arbitration in collective bargaining context). It is precisely in the collective bargaining context where Congress and the Court have repeatedly emphasized that the worker has the greatest bargaining strength. *See, e.g., Warrior & Gulf*, 363 U.S. at 582-83; *Enterprise Wheel & Car Co.*, 363 U.S. at 597. Accordingly, contracts forged in this milieu should be the most strictly enforced.

Equally without merit is petitioner's contention that the general rule of arbitrability is inapplicable because of the possibility that a union will decline to proceed with a grievance or a request for arbitration. This argument for a special rule is unavailing for several reasons.

First, based on the possibility that a union will not pursue arbitration, petitioner seeks to have the exception drive the rule, ignoring the important benefits arbitration provides, as recognized by settled federal policy and this Court's precedents. The argument ignores the fact that unions repeatedly handle such claims, and there is no evidence to support the view that unions do not pursue such claims vigorously.[10]

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[10] *See, e.g.*, Robert A. Gorman, *The* Gilmer *Decision and the Private Arbitration of Public Law Disputes*, 1995 U. Ill. L. Rev. 635, 675 n.128 (1995) (noting the lack of empirical support for a distinction between *Gilmer* and *Gardner-Denver* that turns on the idea that unions will not ardently represent their members). Not only does the evidence fail to support the contention that unions will be less than zealous, unions have a strong interest in negotiating favorable arbitration agreements and pursuing meritorious claims. *See Clayton*

(Continued...)

Second, even where a union does not go forward, an individual employee has recourse to the arbitration process or to judicial oversight. If a union declines to pursue a grievance and compel arbitration, the employee will have one of two options: depending on the collective bargaining agreement, either (1) the employee has the option of proceeding with the grievance or arbitration individually, *see* 29 U.S.C. § 159(a), in which case the employer can resolve the dispute with the employee without union participation; or (2) the union will have exclusive authority to pursue a grievance or demand arbitration, in which case the individual can proceed to court if the union's refusal to go forward is wrongful. *See Republic Steel Corp. v. Maddox,* 379 U.S. 650, 657-59 (1965); *DelCostello v. International Bhd. of Teamsters,* 462 U.S. 151, 163-65 (1983). Courts are uniquely capable of developing standards for wrongfulness in this context based on their federal common law authority under the LMRA. *See Lincoln Mills,* 353 U.S. at 456.

The Court need not reach those standards because they are not presented in this case. There has been no showing that the union refused petitioner's request to go forward with the grievance and arbitration process. Instead, there is only evidence that petitioner and his union discussed his case and that the union suggested that he file suit in court. Pet. App. 3a-4a. Both the petitioner and the union failed to pursue the grievance and arbitration process. To the extent that there is a suggestion of confusion about the governing law because the Fourth Circuit's *Austin* decision had not yet issued (Pet. Br. at 3-4), this suggested confusion – and resulting idiosyncratic facts – cannot justify a sweeping rule holding all such arbitration provisions unenforceable. Assuming arguendo that petitioner was confused, this confusion was caused by an asserted clarification in the governing law, not by any unfairness in the arbitration process. It should not be allowed to distort the issue, and should not lead to an adoption of principles inconsistent with the strong federal policy favoring arbitration, as established in statute and this Court's precedents.

Accordingly, petitioner's contention that the nature of the collective bargaining relationship precludes enforcement of an arbitration provision regarding statutory claims is unavailing. Just as arbitration of non-statutory claims serves valuable purposes in the collective bargaining context, and just as arbitration of statutory claims serves valuable purposes outside the collective bargaining context, so too arbitration of statutory claims in the collective bargaining context serves valuable purposes. And, just as enforcement of arbitration provisions in other contexts is required by federal policy and this Court's holdings implementing that policy, so too is enforcement of arbitration provisions required in this context.

C. This Court's Decision In *Gardner-Denver* Does Not Preclude Arbitration

Finally, petitioner contends that this Court's decision in *Gardner-Denver* compels a different rule for arbitration of statutory claims in collective bargaining agreements than the rule that governs (1) arbitration of statutory claims outside the collective bargaining context and (2) arbitration of non-statutory claims in the collective bargaining context. Petitioner's request for a special rule is untenable.

The short, and sufficient, answer to petitioner's argument is that *Gardner-Denver* did not involve the question at issue

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(...Continued)

v. International Union United Auto., Aerospace and Agric. Implement Workers of Am., 451 U.S. 679, 686 n.11 (1981) (noting that the conscientious handling of grievances enhances the union's prestige with employees and strengthens its stature as the exclusive bargaining representative).

here. Instead, *Gardner-Denver* involved an individual who had pursued a contractual claim through the arbitration process; the question was the effect to be given to the arbitration decision, and whether it barred subsequent judicial review of a statutory claim. *See Gardner-Denver,* 415 U.S. at 43. Similarly, both *McDonald v. City of West Branch,* 466 U.S. 284 (1984) and *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981) – upon which petitioner also seeks to rely – involve the effect to be given to arbitration decisions, not a failure to undergo arbitration entirely. As a result, "those cases did *not* involve the issue of the enforceability of an agreement to arbitrate statutory claims. Rather, they involved the quite different issue whether arbitration of contract-based claims precluded judicial resolution of statutory claims." *Gilmer*, 500 U.S. at 35 (emphasis added). Thus, any claim that the holding in *Gardner-Denver* precludes enforcement of the arbitration provision is erroneous. *See, e.g., United States v. Stanley,* 483 U.S. 669, 680 (1987) ("no holding can be broader than the facts before the court"); *Crawford-El v. Britton*, 118 S. Ct. 1584, 1592 (1998).

To the extent that *Gardner-Denver* includes more general dicta about the nature of arbitration and enforcement of statutory rights, these comments, now nearly a quarter century old, must be considered in their historical context and in light of the Court's more contemporary decisions. This Court repeatedly has rejected the outmoded skepticism of arbitration, and has emphasized the broad federal policy favoring arbitration. Indeed, in *Gilmer* itself, this Court specifically disavowed *Gardner-Denver*'s general skepticism of the arbitration process. *See Gilmer*, 500 U.S. at 34 n.5. Accordingly, petitioner's argument that the Fourth Circuit's judgment cannot be affirmed consistent with *Gardner-Denver*'s holding is unavailing.

Moreover, the Court should reject the request of petitioner's *amici* for the Court to create a code-like "rule book" addressing when disputes will or will not be arbitrable. The facts of this case illustrate, as well as any, the rich diversity of situations in which parties can bargain for various kinds of dispute resolution (here, a three-step grievance process ending in arbitration). What the Court can and should do is to enforce agreements to arbitrate workplace claims, whether the employees are covered by a collective bargaining agreement or not. The various ways that an individual's statutory claim might or might not be pursued in the collective bargaining context can be handled by existing law, to be interpreted and developed by the lower courts. Both the FAA and the LMRA provide standards by which courts can stay cases pending arbitration or dismiss cases without prejudice to allow arbitration to proceed.[11] In either instance, court intervention is possible in the event that the arbitration process fails.

The judgment below is consistent with the objective of providing parties – whether covered by a collective bargaining agreement or not – with an arbitration forum in which to resolve their disputes. The magistrate judge dismissed petitioner's complaint *without prejudice* and carefully avoided addressing the merits of his claim, stating simply that "[t]he arbitration agreement should be enforced [and that] [t]he question of whether arbitration may now be available or the result thereof is not before the court." Pet. App. 26a. The district court similarly granted summary judgment for the defense but dismissed *without prejudice.* Pet. App. 18. The district court would have entertained evidence by petitioner that the union had "handled his grievance perfunctorily or in bad faith, [or] . . . that a union breach of duty contributed to an erroneous outcome in the contractual grievance proceedings." *Id.* Petitioner failed to present that evidence. Accordingly, the Fourth Circuit affirmed while noting that no arbitration had yet addressed the merits or arbitrability of petitioner's claims Pet. App. 5a. Thus the decision simply stands for enforcement of the arbitration provision and the arbitral regime; other issues were not presented or addressed for the fundamental reason that no arbitration had occurred.

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[11] *See* 9 U.S.C. § 3; *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 40 n.9 (1987) (noting that the federal courts look to the standards of the FAA in developing federal common law under § 301 of the LMRA).

In sum, contrary to petitioner's extensive protestations, *Gardner-Denver* does not support a categorical rule prohibiting the enforcement of arbitration provisions in the collective bargaining context with regard to statutory claims. Nor do the principles governing arbitration both within and outside the collective bargaining context – which establish a broad federal policy favoring arbitration and which include statutory claims outside the collective bargaining context – support such a rule. Indeed, to the extent that *Gardner-Denver* is given such a reading, it is "far out of step with [the Court's] current strong endorsement of the federal statutes favoring this method of resolving disputes." *Rodriguez de Quijas,* 490 U.S. at 480. *Gardner-Denver* cannot furnish the justification for petitioner's special rule of inarbitrability; as with other such provisions, arbitration provisions in collective bargaining agreements providing for arbitration of statutory claims should be given effect.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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In The

Supreme Court of the United ~~States~~

October Term, 1997

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CEASAR WRIGHT,

Petitioner,

v.

UNIVERSAL MARITIME SERVICE CORP., et al.,

Respondents.

◆

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

◆

BRIEF FOR CHAMBER OF COMMERCE OF THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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TABLE OF CONTENTS

Page

INTEREST AND CONCERN OF THE AMICUS..... 1

STATEMENT OF FACTS.......................... 2

ISSUES PRESENTED................................ 2

SUMMARY OF ARGUMENT........................ 3

ARGUMENT 5

I. THE COURT SHOULD ADOPT GILMER AS THE BRIGHT-LINE RULE FOR THE ARBITRATION OF STATUTORY DISCRIMINATION CLAIMS OF EMPLOYEES IN COLLECTIVE BARGAINING UNITS 5

A. Congress Has Liberally Extended The Policy Favoring Arbitration To Include Statutory Discrimination Claims 6

1) The Civil Rights Act of 1991 6

2) The Federal Arbitration Act ("FAA")... 9

3) National labor policy strongly supports arbitration.................... 12

B. Unions' Majoritarian Interests Provide No Basis To Deprive Bargaining Unit Employees Of The Option To Arbitrate Statutory Discrimination Claims.......... 13

1) The employment laws rely on unions to perform representative functions and provide remedies for unions' discrimination or failures to represent fairly............................ 13

TABLE OF CONTENTS – Continued

Page

2) Labor unions have the need and incentives to address their members' claims of employment discrimination, and are appropriate representatives on such matters 15

3) Driving workers to the EEOC and private attorneys does not and will not decrease employment discrimination or better protect workers' rights 17

C. Parties To Collective Bargaining Agreements Can And Do Agree To Arbitrate Statutory Discrimination Claims 25

II. IF GARDNER-DENVER HAS CONTINUED VITALITY, THE POLICY FAVORING ARBITRATION REQUIRES THAT UNION EMPLOYEES ARBITRATE STATUTORY DISCRIMINATION CLAIMS IN APPROPRIATE SETTINGS 26

CONCLUSION 29

TABLE OF AUTHORITIES

Page

CASES

Alexander v. Gardner-Denver, 415 U.S. 36 (1974). . . .*passim*

Asplundh Tree Expert Co. v. Bates, 71 F.3d 592 (6th Cir. 1995) 10

AT&T Technologies v. Communications Workers of America, 475 U.S. 643 (1986)............. 1, 12, 25

Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875 (4th Cir. 1996) cert. denied 117 S.Ct. 432 (1996) .... *passim*

Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728 (1981) 28

Bercovitch v. Baldwin School, Inc., 133 F.3d 141 (1st Cir. 1998) 6

Brisentine v. Stone & Webster Engineering Corp., 117 F.3d 519 (11th Cir. 1997) 27

Brown v. Trans World Airlines, 127 F.3d 337 (4th Cir. 1997) 27

Cole v. Burns Int'l Security Services, 105 F.3d 1465 (D.C. Cir. 1997) 9

Covington v. District of Columbia, 57 F.3d 1101 (D.C. Cir. 1995) 23

Del Costello v. Teamsters, 462 U.S. 151 (1983) 14

Dickstein v. duPont, 443 F.2d 783 (1st Cir. 1971) 11

Duffield v. Robertson Stephens & Co., 1998 U.S. App. LEXIS 9284 (9th Cir., May 9, 1998) 7

EEOC v. Frank's Nursery & Crafts, Inc., 966 F.Supp. 500 (E.D. Mich. 1997) 6

Page

EEOC v. Local 638, 532 F.2d 821 (2d Cir. 1976) 16

EEOC v. Local 638, 565 F.2d 31 (2d Cir. 1977) 16

EEOC v. Local 638, 753 F.2d 1172 (2d Cir. 1985) 16

EEOC v. Sears, Roebuck & Co., 1992 U.S.Dist. LEXIS 20046 at *7 (N.D. Ill. 1992) 21

EEOC v. Sears, Roebuck & Co., 839 F.2d 302 (7th Cir. 1988) 20, 21, 25

EEOC v. Shopmen's Local 832, 1997 U.S. App. LEXIS 9570 (2d Cir. 1997) 14

Emporium Capwell Co. v. Western Addition Community Organization, 420 U.S. 50 (1975) 29

Erving v. Virginia Squires Basketball Club, 468 F.2d 1064 (2d Cir. 1972) 11

Farrar v. Hobby, 506 U.S. 103 (1992) 22

First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995) 25

Ford Motor Co. v. Huffman, 345 U.S. 330 (1953) 13

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) . . . . *passim*

Goodyear Atomic Corp. v. Miller, 486 U.S. 174 (1988) 7

Harrison v. Eddy Potash, Inc., 112 F.3d 1437 (10th Cir. 1997) 27, 28

Hubbard v. United States, 115 S.Ct. 1754 (1995) 7

Johnson v. Hubbard Broadcasting, Inc., 940 F.Supp. 1447 (D.Minn.1996) 6

Page

Jurgens v. EEOC, 660 F.Supp. 1097 (N.D. Tex. 1987) 21

Local 28 of Sheet Metal Workers, 753 F.2d 1172 (2d Cir. 1985) aff'd, 478 U.S. 421 (1986) 16

Metropolitan Edison Co. v. N.L.R.B., 460 U.S. 693 (1983) 13, 27

Miller v. Public Storage Management, Inc., 121 F.3d 215 (5th Cir. 1997) 6

O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308 (1996) 1

Oncale v. Sundowner Offshore Services, Inc., 523 U.S. ___, 118 S.Ct. 998 (1998) 7, 23

Patterson v. McLean Credit Union, 491 U.S. 164 (1989) overruled on other grounds 8

Pennsylvania v. Delaware Valley Citizens' Council, 483 U.S. 711 (1987) 22

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Page

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42 U.S.C. §1981a 22

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42 U.S.C. §§12101, et seq 2

42 U.S.C. §12111(2) 14

42 U.S.C. §12212 6

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INTEREST AND CONCERN OF THE AMICUS[1]

The Chamber of Commerce of the United States ("the Chamber") is the world's largest business federation. With substantial membership in each of the 50 States, it represents more than 3,000,000 businesses and professional organizations of every size and in every sector of the economy. The Chamber thus serves as the principal voice for American employers.

Among its activities, the Chamber represents the interests of its members on important matters pending before the courts and the other branches of government. The Chamber has participated as an *amicus curiae* in numerous cases before the U.S. Supreme Court ("the Court"), frequently on issues involving employment discrimination.[2]

Many of the Chamber's members have employees in collective bargaining units, and the resolution of this case will affect the manner in which these members will resolve statutory employment discrimination claims. Depending on its scope, the Court's decision could affect virtually all of the Chamber's members.

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[1] Pursuant to Supreme Court Rule 37.6, Amicus states that no counsel for a party authored this brief in whole or in part, and no person or entity other than the Chamber of Commerce of the United States, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief. Letters of consent are filed with this brief.

[2] See, e.g., *Walters v. Metropolitan Educ. Centers, Inc.*, 117 S.Ct. 660 (1997); *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996); *Gilmer v. Interstate/Johnsons Lane Corp.*, 500 U.S. 20 (1991); *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643 (1986).

STATEMENT OF FACTS

This is an action brought under the Americans with Disabilities Act, 42 U.S.C. §§12101, *et seq.* ("ADA"). Petitioner is a former union longshoreman in the Port of Charleston, S.C. In February 1992, he fell at work and fractured his heel. He brought a claim under the Longshore and Harbor Workers' Compensation Act, and asserted that he was permanently disabled. Petitioner's doctor and a three-physician panel confirmed that the disability was permanent. The workers' compensation claim was settled for $250,000, and the U.S. Department of Labor approved the settlement in June 1994.

Seven months later, Petitioner appeared at the hiring hall, presented a doctor's release to return to work, and began working for four stevedoring contractors. When the companies discovered that Petitioner was working, they and their multi-employer collective bargaining representative notified Petitioner's union that Petitioner would no longer be accepted for employment referrals because it had been determined that his disability was permanent. The union advised Petitioner to get counsel.

Petitioner then exhausted his administrative remedies with the EEOC and filed this action. On Respondents' motion, the district court granted summary judgment to the employers, holding that Petitioner was required to arbitrate his statutory ADA claim under the collective bargaining agreement. The Fourth Circuit affirmed in a unanimous, unpublished decision. When Petitioner turned to arbitration, his disability discrimination claim was foreclosed there as stale. This Court then granted *certiorari.*

ISSUES PRESENTED

1. Should the Court overrule *Alexander v. Gardner-Denver,* 415 U.S. 36 (1974), and adopt a bright-line rule, by which employees and employers may collectively bargain for enforceable arbitration provisions that extend to statutory discrimination claims?
2. Absent a bright-line rule, should employees and employers be permitted to bargain collectively for enforceable arbitration provisions extending to statutory discrimination claims, where the arbitration provisions explicitly include such claims, full statutory remedies are available, and appropriate steps are present to safeguard against unions that improperly fail to pursue such claims on their members' behalf?

SUMMARY OF ARGUMENT

It is time for the Court to overrule *Alexander v. Gardner-Denver,* 415 U.S. 36 (1974). Petitioner argues that *Gardner-Denver* establishes a bright-line rule. Whatever it stood for at the time it was decided, after years of jurisprudence increasingly favoring arbitration, *Gardner-Denver* has left litigants uncertain and the lower courts in conflict. Some lower courts have observed that *Gardner-Denver* might have no remaining currency. *See, e.g., Pryner v. Tractor Supply Co.,* 109 F.3d 354, 365 (7th Cir. 1997) (Posner, J.), *cert. denied,* 118 S. Ct. 295 (1997). The present case is an example of how confusion about *Gardner-Denver* ultimately resulted in an employer burdened with litigation and a grievant with no forum.

In the 24 years since *Gardner-Denver,* Congress and the Court have increasingly favored the arbitration of statutory claims, including employment discrimination claims. What is needed is an up-to-date, bright-line rule, extending to such claims for union employees the same rule as for all other employees, as stated in *Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20 (1991).

In *Gilmer,* the Court departed from many of *Gardner-Denver's* underpinnings:

> The Court in Alexander v. Gardner-Denver Co. also expressed the view that arbitration was inferior to the judicial process for resolving statutory claims. That "mistrust of the arbitral process," however, has been undermined by our recent arbitration decisions. "[W]e are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution."

500 U.S. at 34 n.5 (citations omitted). The Court also rejected a variety of other arguments that questioned arbitration as a forum. *See id.* at 30-33.

Nevertheless, in *Gilmer,* the Court chose to distinguish *Gardner-Denver,* rather than overrule it. As the Court stated:

> There are several important distinctions between the Gardner-Denver line of cases and the case before us. First, those cases did not involve the issue of the enforceability of an agreement to arbitrate statutory claims. . . . Since the employees there had not agreed to arbitrate their statutory claims, and the labor arbitrators were not authorized to resolve such claims, the arbitration in those cases understandably was held not to preclude subsequent statutory actions. Second, because the arbitration in those cases occurred in the context of a collective-bargaining agreement, the claimants there were represented by their unions in the arbitration proceedings. An important concern therefore was the tension between collective representation and individual statutory rights, a concern not applicable to the present case. Finally, those cases were not decided under the FAA [the Federal Arbitration Act], which, as discussed above, reflects a "liberal federal policy favoring arbitration agreements."

Id. at 35 (citation omitted).

Changed circumstances now address these distinctions and permit the Court to extend to unionized workplaces the *choice* of arbitration as a forum for resolving statutory discrimination claims. The Court should therefore extend *Gilmer* to collective bargaining unit employees. At the least, on a case-by-case basis, the Court should enforce collectively bargained agreements to arbitrate such claims, when the facts meet *Gilmer's* concerns.

ARGUMENT

I. THE COURT SHOULD ADOPT GILMER AS THE BRIGHT-LINE RULE FOR THE ARBITRATION OF STATUTORY DISCRIMINATION CLAIMS OF EMPLOYEES IN COLLECTIVE BARGAINING UNITS.

Taking in reverse order *Gilmer's* concerns with arbitration for collective bargaining unit employees, each of those concerns now has been addressed. First, Congress has gone beyond the Federal Arbitration Act, 9 U.S.C. §§1, *et seq.*, to state in subsequent legislation its support for the arbitration of statutory discrimination claims. Second, the skepticism about collective representation does not take into account significant protections afforded employees, changes in union demographics since *Gardner-Denver*, and the increasing delays and inadequacies of traditional litigation. Third, it has always been up to the courts to determine the scope of a given arbitration agreement: courts need require the arbitration of statutory claims only where the parties have agreed to it. Thus, the concerns stated in *Gilmer* have been addressed, and the Court should extend *Gilmer* as a bright-line rule for union workers.

A. Congress Has Liberally Extended The Policy Favoring Arbitration To Include Statutory Discrimination Claims.

1) The Civil Rights Act of 1991.

In the Civil Rights Act of 1991 ("CRA"), enacted only five months after the Court decided *Gilmer,* Congress endorsed the arbitration of Title VII cases. Pub.L. 102-166, 105 Stat. 1071 (1991). Section 118 of the CRA provides that "where appropriate and to the extent authorized by law, the use of alternate dispute resolution, including . . . arbitration, is encouraged to resolve disputes arising under [Title VII]." 105 Stat. at 1081, *reprinted in* notes to 42 U.S.C. §1981. Not long before, Congress had adopted virtually identical language in the ADA, 42 U.S.C. §12212.

As the majority of lower courts have recognized, the plain language of these provisions endorses alternative dispute resolution methods such as arbitration.[3] Indeed,

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[3] *See Bercovitch v. Baldwin School, Inc.,* 133 F.3d 141, 150 (1st Cir. 1998) ("In light of the language in the ADA text itself, this legislative history is not sufficient to rebut the presumption in favor of arbitration . . . [W]e do not find any 'inherent conflict' between mandatory arbitration of ADA claims and the policies behind the ADA"); *Miller v. Public Storage Management, Inc.,* 121 F.3d 215, 218 (5th Cir. 1997) (given the express language encouraging arbitration, court rejects argument that the legislative history of the alternate dispute resolution provision in the ADA takes that statute out of the FAA's arbitration requirements); *Seus v. John Nuveen Co.,* 1997 U.S.Dist.LEXIS 8209 at *16 (E.D.Pa.1997) (despite legislative history of section 118, that section encourages arbitration based on a U-4 form, and therefore arbitration is compelled); *EEOC v. Frank's Nursery & Crafts, Inc.,* 966 F.Supp. 500, 503-04 (E.D. Mich. 1997) (applying *Gilmer* to require arbitration, finding support in the plain language of section 118); *Johnson v. Hubbard Broadcasting, Inc.,* 940 F.Supp. 1447, 1457-58 (D. Minn.1996) (legislative history of section 118 does not affect its express language, which encourages arbitration).

the Fourth Circuit relied on this language to support its extension of *Gilmer* to a union setting. *See Austin v. Owens-Brockway Glass Container, Inc.,* 78 F.3d 875, 881 (4th Cir. 1996), *cert. denied,* 117 S.Ct. 432 (1996) (legislative history of section 118 supports arbitration under a collective bargaining agreement). A minority view relies on a misreading of the legislative history to defeat the statute's plain language.[4]

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[4] *See Duffield v. Robertson Stephens & Co.,* 1998 U.S. App. LEXIS 9284 (9th Cir., May 9, 1998). In *Duffield,* the Ninth Circuit turns section 118 on its head. The court seizes on the words, "where appropriate and to the extent authorized by law," analyzes portions of the legislative history written prior to *Gilmer,* and holds that Congress impliedly overruled *Gilmer* and adopted *Gardner-Denver. Duffield* therefore declines to apply *Gilmer* on facts indistinguishable from that case.

The plain language of section 118, when endorsing arbitration "to the extent authorized by law," could only be endorsing *Gilmer. See Hubbard v. United States,* 115 S.Ct. 1754 (1995) ("In the ordinary case, absent any 'indication that doing so would frustrate Congress's clear intention or yield patent absurdity, our obligation is to apply the statute as Congress wrote it' "); *Oncale v. Sundowner Offshore Services, Inc.,* 523 U.S. ___, 118 S.Ct. 998, 1002 (1998) ("[I]t is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.").

The Court announced *Gilmer* on May 13, 1991; the Senate passed the CRA more than five months later, on October 30, 1991; the House passed it on November 7, 1991; and the President signed it into law on November 21, 1991. Congress is presumed to know existing law pertinent to legislation that it enacts. *Goodyear Atomic Corp. v. Miller,* 486 U.S. 174, 184-85 (1988). Moreover, on the floor in each house, Members expressly referred to *Gilmer. See, e.g.,* 137 Cong. Rec. S15472, 15478 (Oct. 30, 1991); 137 Cong. Rec. H9505, 9548 (Nov. 7, 1991). Thus, the words, "to the extent authorized by law," endorsed *Gilmer.*

Searching for an *implied* enactment overruling *Gilmer*, as in looking for any legislation by implication, neglects that it

> is at best dangerous to assume that all the necessary participants in the law-enactment process are acting upon the same unexpressed assumptions. And likewise dangerous to assume that, even with the utmost self-discipline, judges can prevent the implications they see from mirroring the policies they favor.

Thompson v. Thompson, 484 U.S. 174, 192 (1988) (Scalia, J., concurring).

The Ninth Circuit reached its result by relying on two committee reports that regarded *Gardner-Denver* as the law that would control arbitration. The reports were issued respectively on April 24, and May 17, 1991. H.R.Rep. No. 40 (I), 102d Cong., 1st Sess. 15-16 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549; H.R.Rep. No. 40(II), 102d Cong., 1st Sess. 78 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694. Given that one report was published *before Gilmer* and the other just *four days after*, it is not surprising that both assume that *Gardner-Denver* states the law – after all, *Gardner-Denver* did state the law at the time the reports were written. What this neglects is that over the next several months, and well before the CRA's enactment, the Court decided *Gilmer* and Congress referred to it expressly in debate on the CRA. By the time of enactment, *Gilmer* also stated the law.

Finally, Congress knows how to overrule the Court's decisions; indeed, it did so in other respects in the CRA itself. The statute expressly overrules *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642 (1989), and states as one of its purposes "to respond to [other] recent decisions of the Supreme Court. . . . " CRA, §3(2), Pub. L. No. 102-166, 1991 U.S.C.C.A.N. (195 Stat.) 1071, at 1071. The House Committee on the Judiciary report specified the other cases being addressed. If Congress wanted to overrule *Gilmer*, it would have amended the CRA prior to passage or in subsequent legislation. *See Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989), *overruled on other grounds* in the CRA (in cases of statutory interpretation, *stare*

2) The Federal Arbitration Act ("FAA").

Congress' strong policy in the FAA, favoring arbitration, applies to the vast majority of union employees, and therefore any bright-line rule applying to all union employees must reflect that policy. "The arbitration act covers almost the whole field of arbitrable disputes, only a subset of which (and a small one in 1925) grows out of collective bargaining agreements." *Pryner, supra*, 109 F.3d at 359. The Act extends to any "contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction. . . . " 9 U.S.C. §2.

However, the statute contains the following exclusion: "but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. §1. The Court declined to interpret this language in *Gilmer* and has not done so since. 500 U.S. at 25 n.2. The prevailing view has been that this exclusion applies narrowly to seamen, railroad employees, and other transport workers who are directly engaged in moving passengers or goods in foreign or interstate commerce. An alternative view – clearly in the minority – has developed that reads this language to exclude from the FAA virtually all employment contracts.

The majority rule is correct. The District of Columbia Circuit recently wrote a cogent opinion typical of this view, based on traditional principles of statutory construction. *See Cole v. Burns Int'l Security Services*, 105 F.3d 1465, 1470-71 (D.C. Cir. 1997) ("every circuit to consider

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decisis has special force, for "unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what [the Court] has done"). Congress did not do so with respect to *Gilmer*.

this issue squarely has found that section 1 of the FAA exempts only the employment contracts of workers actually engaged in the movement of goods in interstate commerce").

The Seventh Circuit adopted the narrow reading of the exclusion last year. *See Pryner,* 109 F.3d at 356-58. It held that contrary decisions misapply a modern reading of the words, "in commerce," to an Act drafted in 1925, when those words did not carry such a broad meaning. Writing for the court, Judge Posner observed that even commentators who prefer a broad reading of the section 1 exclusion concede that the "prevailing view" is the narrow view, limiting it to cases where the workers themselves are personally engaged in interstate commerce. *See id.* at 358.

The Second Circuit reached the same conclusion, again focusing on the meaning of the language at the time of enactment. *See Tenney Engineering, Inc. v. United Elec., Radio & Machine Workers, Local 437,* 207 F.2d 450, 452-53 (2d Cir. 1953) (fns. omitted) (section 1 exclusion applies only to workers "who are actually engaged in the movement of interstate or foreign commerce or in work so closely related thereto as to be in practical effect part of it.").

Most other circuits have reached the same conclusion.[5] The minority view is in the Third and Fourth

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[5] *See, e.g., Rojas v. TK Communications, Inc.,* 87 F.3d 745, 748 (5th Cir. 1996) (majority of circuits have determined that the exclusionary clause is to be narrowly construed to exempt only contracts of employment of workers engaged in the movement of goods in commerce); *Asplundh Tree Expert Co. v. Bates,* 71 F.3d 592, 600-01 (6th Cir. 1995) (section 1 "should be narrowly

Circuits, but these courts view the exclusion alternatively as irrelevant to the present issue (Fourth Circuit) or reach their conclusion without explanation (Third Circuit).[6]

The facts of the case now before the Court might not require resolution of this issue because Petitioner's particular job as a stevedore might bring him within even the narrow reading of the exclusion. However, because the FAA's exclusion applies only to a small fraction of union employees,[7] any bright-line rule must reflect the status of most union employees as falling within the FAA and its pro-arbitration policies.

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construed to apply to employment contracts of seamen, railroad workers, and any other class of workers actually engaged in the movement of goods in interstate commerce."); *Erving v. Virginia Squires Basketball Club,* 468 F.2d 1064, 1069 (2d Cir. 1972) (section 1 exclusion applies "only to those actually in the transportation industry"); *Dickstein v. duPont,* 443 F.2d 783, 785 (1st Cir. 1971) (courts have generally limited the section 1 exclusion to employees "involved in, or closely related to, the actual movement of goods in interstate commerce"); *Signal-Stat Corp. v. Local 475,* 235 F.2d 298, 302-303 (2d Cir. 1956), *cert. denied,* 354 U.S. 911, *and reh'g denied* 355 U.S. 852 (1957) (same).

[6] *See Austin, supra,* 78 F.3d at 879 (applying exclusion broadly but holding that arbitration is required anyway in view of the long-standing and important role that arbitration has played in labor disputes); *Pritzker v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.,* 7 F.3d 1110, 1120 (3d Cir. 1993) (stating its conclusion with little analysis).

[7] For example, in 1996, the total work force was nearly 112 million. Of those, 18 million were in collective bargaining units, but only 1.1 million of these were transport workers. U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS ("BLS"), *Employment and Earnings,* Vol. 44, No. 1, at 211-214 (1/97).

3) National labor policy strongly supports arbitration.

Arbitration has long served as the central means for resolving disputes arising in the collective bargaining setting. *See United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960). Earlier doubts as to whether agreements to arbitrate labor contract disputes were enforceable were dispelled by *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957), and the *Steelworkers Trilogy*. These cases cemented the Court's policy of reliance on and deference to labor arbitration.[8]

The Court has repeatedly reaffirmed the principles first established in the *Steelworkers Trilogy*. *See, e.g., AT&T Technologies v. Communications Workers of America*, 475 U.S. 643 (1986) (reaffirming presumption of arbitrability); *United Paperworkers Intern. Union v. Misco, Inc.*, 484 U.S. 29 (1987) (reaffirming narrow scope of judicial review on the merits).

Thus, in fashioning a bright-line rule, the extension of *Gilmer* would correctly reflect Congressional policy favoring arbitration in the collective bargaining setting.

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[8] *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co., supra*, and *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). *Lincoln Mills* held that the courts had jurisdiction to enforce arbitration provisions in collective bargaining agreements under section 301 of the Labor-Management Relations Act, 29 U.S.C. §185(a). *Lincoln Mills, supra,* 353 U.S. at 450-51. In *American Mfg., supra*, the role of the courts was limited to determining arbitrability. 363 U.S. at 568. In *Warrior & Gulf, supra*, the Court stated that "doubts [regarding arbitrability] should be resolved in favor of coverage." 363 U.S. at 583. Finally, in *Enterprise Wheel, supra*, the Court held that an arbitrator's award drawing its essence from the collective bargaining agreement must be enforced, even if the court would differ on the merits. *See* 363 U.S. at 597-599.

As the Fourth Circuit observed, even absent the FAA, this is a sufficient legal and policy basis upon which to favor the arbitration of statutory discrimination claims. *See Austin, supra*, 78 F.3d at 882-83.

Thus, Congress has now made certain its policy favoring the arbitration of statutory discrimination claims.

B. Unions' Majoritarian Interests Provide No Basis To Deprive Bargaining Unit Employees Of The Option To Arbitrate Statutory Discrimination Claims.

The *Gilmer* Court also distinguished *Gardner-Denver* by focusing on the tension between collective representation in the union setting and individual statutory rights. When analyzed, this is not a reason to preclude, with a bright-line rule, the arbitration of statutory discrimination claims for collective bargaining unit employees.

1) The employment laws rely on unions to perform representative functions and provide remedies for unions' discrimination or failures to represent fairly.

> This Court long has recognized that a union may waive a member's statutorily protected rights. . . . Such waivers are valid because they "rest on 'the premise of fair representation' and presuppose that the selection of the bargaining representative 'remains free.' "

Metropolitan Edison Co. v. N.L.R.B., 460 U.S. 693, 705 (1983) (citations omitted); *see also, Ford Motor Co. v. Huffman*, 345 U.S. 330, 336-39 (1953) (describing the representative nature of collective bargaining). The Fourth Circuit has applied this principle to a union's agreement to arbitrate statutory discrimination claims, and held that it addressed *Gilmer's* concerns about the representative nature of unions. *See Austin, supra*, 78 F.3d at 885 (citations omitted).

Individual union members also have legal protection. Labor unions fall within the anti-discrimination dictates of Title VII and the other anti-discrimination statutes.[9] Thus, a union's discriminatory decision not to pursue a worker's claim exposes the union to a Title VII claim. *See, e.g., EEOC v. Shopmen's Local 832,* 1997 U.S. App. LEXIS 9570 (2d Cir. 1997) (affirming award in excess of $100,000 to worker whose union would not pursue her discrimination claim). Similarly, when a union fails in its duty to represent workers fairly, the workers may pursue a civil action for breach of the collective bargaining agreement. *See* 29 U.S.C. §185; *Del Costello v. Teamsters,* 462 U.S. 151, 164 (1983). When the collective bargaining agreement incorporates full rights under the discrimination statutes, and the union breaches its duty, the civil action would offer the employee full statutory remedies as damages under section 301.

These two remedial avenues (Title VII and section 301) increase the likelihood that unions will pursue at least strong claims: the more meritorious the employee's discrimination claim, the more obvious will be the unfairness or discriminatory purpose of any decision by the union not to pursue it.

Finally, when a union fails to pursue a meritorious case, public policy may yet be vindicated. The EEOC is of the view that it may bring cases irrespective of a private arbitration. *See* 1997 EEOC *Policy Statement,* No. 915.002 (July 10, 1997) at n. 20, (*citing General Tel.,* 446 U.S. 318, 328 (1990), and 118 Cong. Rec. 4041 (1972)). Collective bargaining unit employees could file a charge with the EEOC, which could pursue a civil action of its own.

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[9] *See* 42 U.S.C. §12111(2) (ADA); 42 U.S.C. §2000e-2(c) (Title VII); 29 U.S.C. §623(c) (ADEA).

Indeed, this could be an excellent use of the Commission's limited resources to develop the law under the statutes for which it is responsible.

2) Labor unions have the need and incentives to address their members' claims of employment discrimination, and are appropriate representatives on such matters.

Organized labor has increasing and much greater diversity in its membership since the *Gardner-Denver* decision in 1974. This, along with vigorous law enforcement, has led to unions' improved records on discrimination.

Specifically, unions have experienced a significant change in demographics since *Gardner-Denver.* At the time of *Gardner-Denver,* 21 percent of American workers who were members of collective bargaining units were women. BLS HANDBOOK OF LABOR STATISTICS: 1977, Table 137 at 102. By 1996, the proportion of women in bargaining units had risen to 40 percent. *See.* U.S. DEPT. OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 1997, table 691, at 332 (117th ed. Washington, D.C. 1997); Diane E. Lewis, *Women's Membership in Unions Up to 39.4%,* THE BOSTON GLOBE, at E7 (Mar. 20, 1998). The proportion of Hispanic members in unions has increased by 20 percent between 1983 and 1997. BLS, *Employment and Earnings,* January 1998; BNA, *Union Membership and Earnings Data Book,* 1997 (1996 figures as cited in AFL-CIO website (*http://www.aflcio.org/uniondifference/uniondiff12.htm.*).

The doubling of the proportion of women and the considerable increase in minority membership necessarily requires unions to take into account the needs of such workers in ways not present at the time of *Gardner-Denver.* The time has passed when unions could afford to ignore or under-represent the interests of minority members; 1998 is not 1974.

The reality of today's union representation obligations is reflected in a sharp decrease in discrimination claims brought against unions. In the 1970's and early 1980's, unions repeatedly were found liable for patterns of discrimination, and often were targeted by the EEOC.[10] More recently, however, these pattern and practice cases and class action suits against unions have become scarce. *See* EEOC, *1982 Annual Report,* at 59 (in 1982, unions were named as respondents in 3,146 charges, which was over 5 percent of all charges filed); *cf.* EEOC, *1994 Annual Report,* at 36 (in 1994, only 590 charges – or 0.6 percent – were against unions). In its recent policy statements on areas of enforcement emphasis, the EEOC makes no reference to unions. *See* EEOC, *1996 National Enforcement Plan, reprinted in* EEOC COMPLIANCE MANUAL (BNA), No. 209, N:2061 (Feb. 8, 1996). The inference is that unions' compliance with the discrimination laws has improved. For those union officials who do discriminate or act unfairly, bargaining unit workers have statutory remedies, and the EEOC also may bring enforcement actions. In perspective, union representation of members' interests in the resolution of employment discrimination claims is sufficient to adopt *Gilmer* for this setting, and such progress should be recognized and encouraged.

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[10] *See, e.g., EEOC v. Local 638 . . . Local 28 of Sheet Metal Workers,* 753 F.2d 1172 (2d Cir. 1985) (and cases cited therein), *aff'd,* 478 U.S. 421 (1986); *EEOC v. Local 638,* 565 F.2d 31 (2d Cir. 1977); *EEOC v. Local 638,* 532 F.2d 821 (2d Cir. 1976); *United States v. Local Union 212,* 472 F.2d 634 (6th Cir. 1973).

3) Driving workers to the EEOC and private attorneys does not and will not decrease employment discrimination or better protect workers' rights.

In their criticism of unions as "gatekeepers" for statutory discrimination claims, Petitioner and his *amici* neglect that the alternatives of representation through the EEOC or the private bar contain pitfalls as deep as workers would find in union representation, but without the recourse that workers have against their unions.

There is no question that the EEOC and the private bar, working with the civil courts, have made great strides in the implementation of the Congressional policy against employment discrimination. However, the Court should also implement Congress' policy favoring arbitration, including the arbitration of discrimination claims. In doing so, the Court should not focus on the negatives of union representation, and compare them to some idealized view of civil litigation as it currently is practiced. Although union representation will fail in certain cases, only an outdated, idealized view of the civil litigation system permits the inference that it offers workers a more accessible, more certain avenue. And, unlike unions, whose failure to support workers may result in civil liability, the EEOC and the plaintiffs' bar work without such checks and balances.

The EEOC as Gatekeeper. The Equal Employment Opportunity Commission testifies annually to Congress that it is not adequately funded to do its assigned tasks. With recent legislative increases in the EEOC's responsibilities and a dramatic increase in charges of discrimination in the 1990's, but with little increase in funding, the EEOC has developed a record-breaking backlog of pending charges, and had to reduce sharply the scope of its activities.

Over the past 17 years, the Commission's staff fell from 3,390 in 1980 to 2,680 in 1997. *See* EEOC, *Budget and Staffing*, posted at EEOC website (*http://www.eeoc.gov/budget.html.*) This decline came at the same time that the agency's obligations expanded, *e.g.*, ADA-charge handling, which now comprises one-fourth of all charges. *See id.* The average caseload per investigator has more than doubled from 55.3 cases in 1990 to 122.0 in 1994. *See* EEOC, *Summary of Enforcement Data and Budget and Staffing Information for the EEOC: FY 1991 through FY 1997*, prepared by EEOC Office of Communications and Legislative Affairs (Dec. 8, 1997). In fiscal 1997, the average time to process a charge of discrimination was 358 days. *See id.* Lengthy as this is, it is *down* from the average of 18 months that charges were pending in 1994. *See* Peter T. Kilburn, *Backlog of Cases Is Overwhelming Job-Bias Agency*, N.Y. Times Abstracts, Nov. 26, 1994 at A6; 1994 WL 2757055.

By 1995, the backlog of pending charges had reached an all-time record of 111,345. *See* EEOC, *Enforcement Activities* ("Enforcement Activities"), posted at EEOC website (*http://www.eeoc.gov/enforce.html*). Overwhelmed, the Commission adopted a triage system. *See* EEOC, *Charge Processing Procedures Adopted, reprinted in* EEOC Compliance Manual (BNA), No. 199, N:3067 at 115 (Apr. 19, 1995). Applying the system, the Commission reduced the backlog in one year by *30 percent*. *See* EEOC, *Enforcement Activities, supra*. This massive, rapid reduction in pending charges, without any additional staff, could only mean that cases were closed with far less attention than what the Commission has traditionally viewed as appropriate.[11]

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[11] This was not the first such implementation of drastic measures to reduce a huge backlog. *See* EEOC, *1982 Annual*

These constraints on resources have also limited the Commission's litigation efforts. The Commission's *1983 Litigation Plan* had envisioned the full investigation of all charges and the litigation of all cases where the Commission found a probable violation and yet conciliation had failed. *See 1983 Litigation Plan, published* as *Resolution Modifying Rapid Charge Processing System* (Dec. 12, 1983), *reprinted in* 239 Daily Lab. Rep. (BNA) (Dec. 12, 1983) at D-1. However, in the *1996 National Enforcement Plan*, the EEOC abandoned this goal. *See* EEOC, *1996 National Enforcement Plan, cited in* Eq. Empl. Compl. Man. (BNA), No. 209, *supra*, at 1, 13. Instead, the EEOC decided that it had to forego some good cases to devote resources to others. *1996 National Enforcement Plan*, at 1, 14.

The Commission therefore focused on certain priorities.[12] *1996 National Enforcement Plan*, Part III at 12. But the priorities do not include, for example, sexual harassment cases, race discrimination cases, or most ADA cases. *See* Michael Selmi, *The Value of the EEOC*, 57 Ohio St. L. J. 1, 14, 21 (1996) (race cases are the largest category of charges filed with the EEOC but "result in the fewest lawsuits" initiated by the EEOC, which seems to "deemphasize race cases"). Even among meritorious cases falling within its new priority limits, the Commission has

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Report (April 19, 1983), *reprinted in* 212 Lab. L. Rep.: Employment Practices (CCH) Issue No. 1323 (Jan. 25, 1984).

[12] The priorities are: (1) repeated, egregious, outrageous cases, pattern and practice cases, and cases involving facially discriminatory policies; (2) national origin claims involving language, religious accommodation cases, ADA accommodation cases, cases involving the obligation to arbitrate, cases involving the intersection of two or more protected classes; and (3) cases going to the integrity of the EEOC's process.

acknowledged that it still will be unable to litigate some that fail conciliation. *1996 National Enforcement Plan* at 13.

The statistics show how the EEOC's limited resources have affected its litigation efforts. For example, of the nearly 179,000 charges filed at the EEOC in 1994-95, the EEOC only filed 685 lawsuits. EEOC, *1994 Annual Report*, at 6; EEOC, *1995 Annual Report*, at 3. Currently, even where it finds cause to believe there has been a violation and conciliation fails, the Commission litigates only about one-in-ten such cases.[13] Moreover, even when the Commission files litigation, there is no guarantee that it will have adequate resources to pursue it.[14]

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[13] These statistics are drawn from EEOC *Summary of EEOC Data, Budget and Staffing, supra*. In 1997, the EEOC received 80,680 charges, of which the vast majority resulted in no cause findings. *See* Selmi, *The Value of the EEOC, supra*, at 5, 9-14 (concluding that 94.7% of the Commission's charge determinations in 1994 resulted in a no-cause finding). Of these, there were only 3,000 cases, where the Commission found cause but did not conciliate the matter. Still, of these 3,000 remaining cases, the EEOC filed litigation in only 295. EEOC, *Summary of EEOC Data, Budget and Staffing, supra*.

Some commentators have observed that the EEOC finds "no cause" in many cases, not based on merit, but in part from bureaucratic constraints. *See, e.g.*, Lenahan O'Connell, *Investigations Are Work: How Bureaucratic and Legal Constraints Influence the Enforcement of Discrimination Law*, 51 PUB. ADMIN. REV. 123 (March/April 1991).

[14] The Commission's *1996 National Enforcement Plan* acknowledges that, as a result of its new priorities, it will have to cut resources even on some cases that are *already pending*. EEOC, *1996 National Enforcement Plan, supra, reprinted in* EQ. EMPL. COMPL. MAN. (BNA), No. 209, N:2061 at 14.

Among the most disturbing examples of the EEOC's litigation practices is *EEOC v. Sears, Roebuck & Co.*, 839 F.2d 302 (7th Cir. 1988). There, six years after initiating a Commissioner's charge of discrimination, the EEOC filed suit. Seven additional

As with unions, the EEOC has "majoritarian" concerns, only its concerns are political. The Commission is administered by Presidential appointees, who respond to the Administration and to Congressional oversight, and the Commission has a constituency of interest groups that lobby for certain priorities and policies.

As with unions, the Commission too has occasionally been found to discriminate, such as against its own employees. For example, it was held liable for race discrimination in a class action brought by its white employees. *Jurgens v. EEOC*, 660 F.Supp. 1097 (N.D. Tex. 1987) (awarding attorneys' fees).

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years later, it tried the case for *10 months* – 185 trial days. The district court ruled for Sears and against the EEOC on all claims. 839 F.2d at 307. After 13 years of preparation, the EEOC could not identify which policy it was challenging on its adverse impact case, at 308 n.5; on disparate treatment, the EEOC did not present even one witness who claimed to have been a victim of discrimination, at 310, 339; it offered no direct or anecdotal evidence of discrimination, at 311; it instead relied almost exclusively on statistical evidence that was "misleading as well as imprecise," developed with an inadequately small sampling, presented by witnesses with no knowledge of Sears or the industry, offered with nothing to support its analytical design, and was misconceived geographically. *Id.* at 316-17, 321, 324, 326-27, 350.

The Seventh Circuit affirmed the judgment for Sears in its entirety. It found that this result followed on the misconduct of the EEOC, whose lawyer was more committed to a particular political advocacy group of his personal liking than to his duties at the EEOC and who had demanded a pre-determination settlement from Sears of *$600 million* on this meritless case to satisfy "outside interest groups," at 357-58. An astonishing *20 years* after the Commissioner's charge was opened, the district court finally closed the case with an award of nearly $600,000 in fees against the Commission. *EEOC v. Sears, Roebuck & Co.*, 1992 U.S. Dist. LEXIS 20046 at *7 (N.D. Ill. 1992).

Given the Commission's constraints, various Administrations have had difficulty bringing people into leadership positions there. For example, between June 1993 and July 1995, no General Counsel was confirmed. *See* EEOC, *1995 Annual Report*, Appendix B (also indicating large gaps in appointments for an interim acting General Counsel during this time).

All in all, workers looking for adequate representation face very real constraints at the EEOC, and there is no reason to expect that, as a general proposition, unions would provide them with less.

The Private Bar as Gatekeeper. The private bar also is an imperfect vehicle for vindicating civil rights. To attract the plaintiffs' bar, cases must offer substantial attorneys' fees. In an ordinary case, statutory fee-shifting offers no more than the *possibility* of collecting regular, hourly rates, contingent on the plaintiff's prevailing.[15] Non-statutory contingent fee arrangements offer little more inducement than statutory fees.[16] This leaves lawyers

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plaintiff can bring related (typically, state law) claims, where

[15] 42 U.S.C. §§1988(b), 2000e-5(k) (shifting fees for prevailing parties). *See Farrar v. Hobby*, 506 U.S. 103 (1992) (civil rights plaintiff who recovers only nominal damages is not entitled to recover fees); Charles Silver, *Incoherence and Irrationality in the Law of Attorneys' Fees*, 12 Rev. Litig. 301 n.55 (Spring 1993) ("There is evidence that lawyers in private practice tend to reject cases offering less than an 80% chance of some recovery by trial or settlement") (citations omitted); *Pennsylvania v. Delaware Valley Citizens' Council*, 483 U.S. 711 (1987) (multiplier proper only on specific evidentiary finding of exceptional case).

[16] Damages in discrimination cases involving intentional misconduct are capped at $300,000 for even the largest employers, and damages are unavailable in adverse impact cases. 42 U.S.C. §1981a. With the caps, contingent fee arrangements do not offer much incentive to the bar unless the

reluctant to take any case other than a clear-cut case. *See, e.g.*, Eric Schnapper, *Advocates Deterred by Fee Issues*, Nat'l Law J., March 28, 1994, at C1 (lawyers reluctant to take discrimination cases on contingent fee, and many workers cannot afford a retainer).

Because unsuccessful plaintiffs' counsel receive no fees, attorneys cannot ignore a claimant's likely popularity with jurors.[17] For this reason, disfavored minorities are likely to be those against whom discrimination occurs at work and, at the same time, those least attractive to the private bar. For example, how many lawyers would have taken the case of an Iranian-American shortly after the hostage-taking in Teheran? What of a gay worker bringing a same-sex sex harassment case in Colorado immediately after the enactment of Proposition 2? *See Romer v. Evans*, 517 U.S. 620 (1996) (describing Proposition 2); *Oncale v. Sundowner Offshore Services*, 523 U.S. ___, 118 S.Ct. 998 (1998) (certain same sex harassment held actionable). What of a manager who was told he was fired for sex harassment, but contends that the real reason for the

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larger damages might be available.

Partner-level employment lawyers commonly charge hourly rates of $260-$300 or more. *See e.g., Covington v. District of Columbia*, 57 F.3d 1101 (D.C. Cir. 1995) (approving $260 for partner-level work); *Weeks v. Baker & McKenzie*, 74 Cal. Rptr. 2d 510 (Cal. Ct. App. 1998) (approving $300). With a damages cap of $300,000, and assuming a contingent fee agreement of 1/3, a lawyer will receive greater than hourly rates only if she prevails, obtains the maximum verdict and completes all work through trial in fewer than 350 hours, an unlikely scenario.

[16] *See* Selmi, *The Value of the EEOC, supra*, at 36-37 (attorneys reject "low lost wages cases that stem from isolated practices that a jury deems unworthy of significant damages"); Richard E. Miller & Austin Sarat, *Grievances, Claims and Disputes*, 15 Law & Soc'y Rev. 525, 535 n.7 (1981) (cases of less than $10,000 systematically screened out).

termination was his race? Finally, the private bar is subject to its own biases. Lynn Hecht Schafran, *Is the Law Male?: Let Me Count the Ways*, 69 Chi.-Kent L. Rev. 397, 404-05 (1993) (male attorney wrongly interpreted female client's distress at outrageous treatment as evidence of hysteria).

The result is that discrimination plaintiffs often appear *pro se*. *See Report of the Working Committees To The Second Circuit Task Force on Gender, Racial, and Ethnic Fairness in the Courts*, ("Second Circuit Report"), Appendix A to the *Report of the Second Circuit Task Force on Gender, Racial, and Ethnic Fairness in the Courts*, at 279 (Nov. 1997). This draws heavily on the judiciary's resources, especially with a 2,166 percent increase in discrimination cases from 1970 to 1989, compared to a 125 percent increase in the overall civil case load. *See id.* at 280.

Thus, the private bar is not an ideal alternative to union representation at arbitration. Rather, it yields to financial pressure and popular concerns and often leaves without representation those who most need it.

Limitations of civil forums. Even those workers who find their way into the civil system are not guaranteed an ideal forum. Task forces in the Second, Eighth and Ninth Circuits have observed that some district judges display increasing impatience with discrimination cases.[17] Backlogs of civil litigation have become enormous.[18] And,

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[17] *See Second Circuit Report, supra*, at 277, 279-80, 282, 285, 289-90 (Nov. 1997); *see also*, *Gender Fairness Task Force Report for the United States Courts of the Eighth Circuit*, Ch. 2, IV.A, at 11 (Sept. 1997), *published at (http://www.wast.edu/8th.cir/gender/gftf1.htm)*; *Ninth Circuit Task Force on Racial, Religious and Ethnic Fairness: Final Report*, at 9 (Aug. 1997).

[18] *See, e.g.*, Rep. of the Proceedings of the Jud. Conf. of the U.S. (March 12, 1991 and September 23-24, 1991) and 1991

civil trials lack the finality of arbitration, with post-trial motions, appeals and new trials sometimes adding years to the process. *See, e.g.*, *EEOC v. Sears, Roebuck & Co.*, 839 F.2d 302 (20 years of investigation and litigation in a meritless case).

In short, absent an overly idealized view of civil litigation today, the imperfections of union representation do not prevent the extension of *Gilmer* to the collective bargaining setting; arbitration with union representation is as useful for this purpose as its civil litigation alternatives.

C. Parties To Collective Bargaining Agreements Can And Do Agree To Arbitrate Statutory Discrimination Claims.

Finally, the *Gilmer* Court distinguished *Gardner-Denver* because the arbitration provision there did not extend to statutory claims and offered no statutory remedies. It has long been the role of the courts to determine whether a particular dispute falls within the scope of the parties' agreement to arbitrate. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943-945 (1995) (the courts, and not arbitrators, decide whether an issue is subject to arbitration, unless the parties specified otherwise in the contract); *AT & T Technologies, supra*, 475 U.S.

Annual Report Of the Director Of The Administrative Office of The United States Courts, Appendix I to 1991 Annual Report of the Director (Detailed Statistical Tables), Table C 6, AT 212 (1992) (reporting that, in 1992, more than 28,421 cases across the country were still awaiting trial more than three years after they were filed). *See also*, California Trial Delay Reduction Act, Cal. Gov't Code §§68600, *et seq.*, Leg. H. 1990 Ch. 1232 §3; (necessitated by frequent five-year delays in civil trials); Harry N. Scheiber, *Innovation, Resistance And Change: A History of Judicial Reform and the California Courts, 1960-1990*, 66 S. Cal. L. Rev. 2049 (July 1993).

at 649 (same). In adopting *Gilmer* as the bright-line rule for collective bargaining unit workers, there is no reason to disturb this fundamental rule. If the parties do not agree to arbitrate statutory discrimination claims, the trial court will not require arbitration.

Thus, to permit union officials, employers, workers, and the lower courts ease and certainty of administration, the Court should adopt *Gilmer* as a bright-line rule for the arbitration of statutory discrimination claims in the collective bargaining setting. Under this rule, if the parties choose to provide in the collective bargaining agreement for the arbitration of statutory discrimination claims, their choice will be enforced.

II. IF GARDNER-DENVER HAS CONTINUED VITALITY, THE POLICY FAVORING ARBITRATION REQUIRES THAT UNION EMPLOYEES ARBITRATE STATUTORY DISCRIMINATION CLAIMS IN APPROPRIATE SETTINGS.

If the Court prefers a case-by-case, fact-based analysis, the criteria on which the analysis should turn are those that the Court identified in *Gilmer,* when distinguishing *Gardner-Denver.* Where the collective bargaining agreement addresses such issues as the parties' agreement to arbitrate statutory claims, the availability of full statutory remedies in arbitration, the union's majoritarian concerns, and if necessary, perhaps also the applicability of the FAA,[19] the arbitration provision should be enforced as was the provision in *Gilmer.* Where the provision fails

adequately to address those concerns, it would fall within *Gardner-Denver,* and arbitration would not be required.

Irrespective of the rationales that they offer, most of the lower courts reach results that turn on these considerations. For example, the Eleventh Circuit focused on *Gilmer's* concerns and held that the arbitration agreement at bar was unenforceable because it was like the one in *Gardner-Denver:* the arbitrator was not given the power to decide statutory claims, and the union had demonstrated that it was "at least unenthusiastic, and perhaps unwilling, to pursue Brisentine's claim to arbitration." *Brisentine v. Stone & Webster Engineering Corp.,* 117 F.3d 519, 523-25 (11th Cir. 1997).

Reaching the opposite result on different facts, the Fourth Circuit applied a similar analysis in *Austin, supra,* 78 F.3d at 881. There, the collective bargaining agreement expressly required the company to comply with the anti-discrimination laws, and the court held that unions may waive rights as part of collective bargaining and that such waivers are " 'valid because they rest on the premise of fair representation.' " *Id.* at 879-80, 885 (*citing Metropolitan Edison Co., supra,* 460 U.S. at 706). The court held that an agreement to arbitrate statutory discrimination claims is but an example of such a waiver. *Id.*

Significantly, on opposite facts, the same Circuit reached the opposite result. *See Brown v. Trans World Airlines,* 127 F.3d 337 (4th Cir. 1997). In *Brown,* the court denied the enforcement of arbitration after finding that the collective bargaining agreement contained a provision prohibiting discrimination, but nothing to indicate that it went beyond contract rights. *Id.* at 341.

In *Harrison v. Eddy Potash, Inc.,* 112 F.3d 1437 (10th Cir. 1997), *petition for cert. filed* (Aug. 6, 1997), the parties' agreement to arbitrate apparently was silent as to statutory claims, again bringing the fact pattern – and the result – within *Gardner-Denver*.[20] The Court also shared *Gilmer's* concern that there might be " 'inherent conflicts between group goals and individual rights that exist in the give-and-take of the collective bargaining process.' " *Id.* at 1453-54 (citation omitted).

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[19] As discussed above, the pro-arbitration language in the subsequently enacted CRA and ADA supplies greater policy support for arbitration of these specific statutory claims than would the more general provisions of the FAA.

Denying arbitration in *Pryner, supra,* the Seventh Circuit again focused on the failure to meet *Gilmer's* concerns: the employees' rights under the collective bargaining agreement were narrower than their statutory rights, and the majoritarian obligations of the union could lead it to disregard the interests of disfavored minorities, such as those who bring discrimination claims. 109 F.3d at 361-63.

Other Circuits have addressed the issue, but their decisions are less instructive.[21]

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[20] The record did not contain the collective bargaining agreement. *See Harrison,* 112 F.2d at 1451-52, 1454 nn.1, 2. Given the employer's silence on the language of the collective bargaining agreement and its failure to put the collective bargaining agreement on the record, the Court inferred that there was no reason to expect any mention in the collective bargaining agreement of arbitrating statutory rights. *See id.* at 1454 n.2.

[21] *Penny v. United Parcel Service,* 128 F.3d 408, 412 (6th Cir. 1997), rejects *Austin* on the oversimplified rationale that *Gilmer* "did not overrule Gardner-Denver but distinguished it. . . . " This point was not lost on the Fourth Circuit, which subsequently applied *Gardner-Denver* in *Brown, supra,* 127 F.3d 337. The Second Circuit read *Gilmer* narrowly but in the distinguishable context of a wage and hour case. *See Tran v. Tran,* 54 F.3d 115, 117 (2d Cir. 1995). The relevant statute (the Fair Labor Standards Act, 29 U.S.C. §§201, *et seq.*) does not encourage arbitration as does Title VII (§118 of the 1991 amendment). . . . " In any event, FLSA cases differ because of the requirement that there be government involvement to resolve them. *See Gilmer,* 500 U.S. at 33; *Barrentine v. Arkansas-Best Freight System, Inc.,* 450 U.S. 728 (1981). The Eighth Circuit's decision in *Varner v. National Super Markets, Inc.,* 94 F.3d 1209 (8th Cir. 1996), *cert. denied,* 117 S.Ct. 946 (1997), holds only that the exhaustion of contractual grievance remedies is not a prerequisite to the filing of a civil claim. The court does not consider *Gilmer* or changes in the law; it simply cites *Gardner-Denver* without more. *See* 94 F.3d at 1213.

Responding favorably to *Gilmer,* some unions and employers have adopted in collective bargaining agreements arbitration provisions that expressly extend to statutory discrimination claims, empower arbitrators to award any remedy permitted by statute, and allow the individual employee either to compel arbitration individually (irrespective of his union's wishes) or to have his personal lawyer participate in the arbitration process. However, bargaining unit employees cannot negotiate individual employment agreements. *See* 29 U.S.C. §159(a); *Emporium Capwell Co. v. Western Addition Community Organization,* 420 U.S. 50, 62-63 (1975). Thus, if unions cannot act on their behalf to agree to arbitration – even under facts as reassuring as these, then collective bargaining unit employees and their employers will be excluded from prospective agreements to arbitrate. This would defeat the parties' preferences and the policies of Congress and the Court, which strongly favor the arbitration of statutory discrimination claims.

CONCLUSION

For the foregoing reasons, the Chamber of Commerce of the United States respectfully urges the Court to overrule *Gardner-Denver* and to adopt *Gilmer* as a bright-line rule, applying to all employees. In the alternative, and at the least, the Court should reject *Gardner-Denver* as a bright-line and permit collective bargaining unit employees, acting through their unions, to bargain for the arbitration of statutory discrimination claims in appropriate circumstances.

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AMICUS CURIAE

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Petitioner,
v.
UNIVERSAL MARITIME SERVICE CORP.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

BRIEF AMICUS CURIAE ON BEHALF OF THE NATIONAL ASSOCIATION OF WATERFRONT EMPLOYERS IN SUPPORT OF RESPONDENTS

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23 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST OF AMICUS CURIAE.. 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. THIS CASE IS NOT CONTROLLED BY THE COURT'S DECISION IN *GARDNER-DENVER* BECAUSE *GARDNER DENVER* ONLY APPLIES WHEN THE COLLECTIVE BARGAINING AGREEMENT DOES NOT REQUIRE ARBITRATION OF STATUTORY CLAIMS.... 3

A. *Gilmer* Provided The Court With Its First Opportunity To Consider Whether Pre-Dispute Employment Agreements To Arbitrate Statutory Employment Claims Are Binding On The Parties 6

B. The Collective Bargaining Agreement At Issue In This Case Contemplates Arbitration Of Statutory Employment Claims 7

II. THE PETITIONER HAS NOT MET HIS BURDEN OF SHOWING THAT CONGRESS INTENDED TO PROHIBIT ENFORCEMENT OF A COLLECTIVE BARGAINING AGREEMENT BASED ARBITRATION OF STATUTORY EMPLOYMENT CLAIMS 8

A. The ADA Cannot Be Read As Barring Arbitration Of ADA Claims Under Collective Bargaining Agreements 8

B. Nothing In The Legislative Histories Of The ADA Or The CRA Supports Petitioner's Construction Of The Text 10

TABLE OF CONTENTS—Continued

Page

III. NO STATUTORY BASIS EXISTS TO DISTINGUISH ARBITRATION SANCTIONED BY *GILMER* FROM CBA BASED ARBITRATION 14

CONCLUSION 18

TABLE OF AUTHORITIES

Cases: Page

Alexander v. Gardner-Denver, 415 U.S. 36 (1974) ..... *passim*
Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728 (1981) 4
Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) ..... *passim*
Griggs v. Duke Power, 401 U.S. 424 (1971) 12
McDonald v. City of West Branch, 466 U.S. 284 (1984) 4
Mitsubishi Motors Corp. v. Solar Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) 6
Paladino v. Avnet Computer Technologies, Inc., —— F.3d —— (11th Cir. 1998) 17
Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989) 6
Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987) 6
Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) 12
Wright v. Universal Maritime Service Corp., 121 F.3d 702 (4th Cir. 1997) 7

Statutes, regulations:

Americans with Disability Act of 1990, P.L. 101-336, 42 U.S.C. § 12101 *et seq.* 7, 8
  § 513, 42 U.S.C. § 12212 ..... *passim*
Civil Rights Act of 1991, P.L. 102-166 9
  § 118, 42 U.S.C. § 1981 note ..... *passim*
Federal Arbitration Act, 9 U.S.C. § 1 14
Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* 16
National Labor Relations Act, 29 U.S.C. § 141 *et seq.* 14
29 C.F.R. § 1917.27(a)(2) 15
29 C.F.R. § 1918.98(a)(2) 15

Legislative History:

Cong. Record
  October 25, 1991, p. 15276 13
  October 30, 1991, p. 29040 13

TABLE OF AUTHORITIES—Continued

Page

October 30, 1991, p. 29045 13
November 7, 1991, p. 30683 13
H. Rept. 101-485, Pt. III 11, 13
H. Rept. 101-596 11
Original Transcript of Proceedings of the House Judiciary Committee during Mark-up of H.R. 2273 (May 1, 1990) 11

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

No. 97-889

CEASAR WRIGHT,
Petitioner,
v.
UNIVERSAL MARITIME SERVICE CORP.,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit**

BRIEF AMICUS CURIAE ON BEHALF OF THE NATIONAL ASSOCIATION OF WATERFRONT EMPLOYERS IN SUPPORT OF RESPONDENTS

STATEMENT OF INTEREST OF AMICUS CURIAE

The National Association of Waterfront Employers ("NAWE")[1] is a not for profit tax-exempt trade association organized under the laws of the District of Columbia. NAWE's 35 members, private sector stevedores and marine terminal operators, operate in over 100 ports in the United States on all three coasts, the Great Lakes, and in the Commonwealth of Puerto Rico. With the exception of Stevens Shipping & Terminal Co. and Strachan Shipping Co., all of the other individual companies named Respondents are NAWE members. These NAWE members also work at numerous other ports throughout the U.S.

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[1] Pursuant to Rule 37.3, letters of consent on behalf of both Petitioner and Respondents have been filed with the Clerk of the Court. Pursuant to Rule 37.6, no part of this brief has been authored by counsel for either party; rather it has been authored in its entirety by counsel for NAWE. No monetary contribution for the preparation of this brief was solicited or received from any Respondent or any other entity. This brief was funded solely through NAWE's annual membership dues.

Aside from a handful of exceptions, every terminal facility operated by a NAWE member is subject to, and operated under, one or more collective bargaining agreement(s) ("CBA") with one or more local union(s) which supply longshore labor. Unlike most other industries, bargaining in this industry is normally conducted on a multi-employer basis and the hiring hall concept is utilized wherever possible.

Due to the fact that an individual employee may work for numerous signatory employers over the course of a week, month, or year, it becomes imperative—from the standpoint of both the signatory employers and the employees represented by the bargaining agent—that the dispute mechanism provided in a collective bargaining agreement resolve every possible employee claim as quickly as possible, so that each employer fully understands his obligations to the affected employee, and the employees to each employer.

Hence, industry bargaining in several port regions is further characterized by a reliance on arbitration as a quick, efficient and fair system of resolving disputes, including disputes that involve statutory employment claims. Consequently, every NAWE member has a direct interest in affirming the decision of the Circuit Court.

SUMMARY OF ARGUMENT

Amicus submits that *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974), presents no bar to affirming the Circuit Court's decision because this early Title VII opinion applies only to CBA agreements that neither provide for

the arbitration of statutory claims nor authorize the arbitrator to resolve such claims. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), the Court's subsequent seminal opinion finding employment agreement based arbitration suitable to resolve statutory employment claims, resolved any lingering confusion surrounding *Gardner-Denver*.

Gilmer's rationale must now be extended to CBA based agreements to arbitrate statutory claims, particularly in view of Congress' subsequent action, placing language in both the texts of the Americans with Disabilities Act and the Civil Rights Act, expressly encouraging the use of arbitration to resolve claims arising under these two statutes. Despite obfuscatory legislative history, supporters of using arbitration as an *alternative* to legal action prevailed. The Congressional intent behind the two complimentary provisions is absolutely clear, as the Circuit Court noted.

Nothing in the ADA or the CRA, or any other federal law, bars the use of CBA based arbitration as a tool to resolve statutory claims. Such arbitration is in fact warranted by today's workplace environment. Frequently, an employee's CBA claim is so entwined with a statutory claim that CBA-based compulsory arbitration will produce a more equitable result than that sought by Petitioner.

ARGUMENT

I. THIS CASE IS NOT CONTROLLED BY THE COURT'S DECISION IN *GARDNER-DENVER* BECAUSE *GARDNER-DENVER* ONLY APPLIES WHEN THE COLLECTIVE BARGAINING AGREEMENT DOES NOT REQUIRE ARBITRATION OF STATUTORY CLAIMS.

The arguments of the Petitioner and his *amici* rest on their misreading of the Court's decision in *Alexander v. Gardner-Denver*, 415 U.S. 36 (174) ("*Gardner-Denver*").

Gardner-Denver and its progeny[2] stand for the proposition that an arbitrator may not decide issues that are outside the scope of the authority granted to the arbitrator *in the contract*. *Gardner-Denver* involved a collective bargaining agreement ("CBA") that gave the arbitrator the authority to decide only contractual claims and not statutory claims. The CBA in *Gardner-Denver* expressly limited the authority of the arbitrator to the consideration of contractual issues:

> (T)he arbitrator shall not amend, take away, add to, or change any of the provisions of this Agreement, and *the arbitrator's decision must be based solely upon an interpretation of the provisions of this Agreement*. *Gardner-Denver,* 415 U.S. at 42 (emphasis added).

Therefore, in *Gardner-Denver*, it was the contract that barred binding arbitration of the statutory claims and not federal law. The employee in *Gardner-Denver* raised his statutory claims during the latter part of the arbitration; however, the arbitrator did not address the employee's statutory claims:

> On December 30, 1969, the arbitrator ruled that petitioner had been 'discharged for just cause.' He made no reference to petitioner's claim of racial discrimination. *Gardner-Denver,* 415 U.S. at 42.

Because the arbitrator in *Gardner-Denver* had not and could not, under the terms of the CBA, address the employees statutory claims, the employee was free to pursue his statutory claims in federal court independent of the arbitration on the related contractual issues.

Amicus concedes that at one time *Gardner-Denver* may have been subject to other interpretations. Today, *Gardner-Denver* must be viewed through the prospective of the Court's holding in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) ("*Gilmer*"). *Gilmer* resolved any confusion about the reach of *Gardner-Denver* and its progeny:

> There are several important distinctions between the *Gardner-Denver* line of cases and the case before us. First, those cases did not involve the issue of the enforceability of an agreement to arbitrate statutory claims. Rather, they involved the quite different issue whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims. *Since the employees there had not agreed to arbitrate their statutory claims,* and the labor arbitrators were not authorized to resolve such claims, the arbitration in those cases understandably was held not to preclude subsequent statutory actions. *Gilmer,* 500 U.S. at 35 (emphasis added).

Thus, *Gilmer* could not have been clearer. *Gardner-Denver* did not present the Court with a case where the parties had reached a pre-dispute agreement to arbitrate statutory claims. Instead, the parties had reached the exact opposite agreement, i.e, not to arbitrate statutory claims.

As such, *Gardner-Denver* never addressed the question of whether a pre-dispute agreement to resolve both contractual and statutory claims through binding arbitration was enforceable. Although not dispositive of the issue presently before the Court, *Gardner-Denver* recognized the vital role that arbitration plays in resolving statutory discriminatory claims within the context of a CBA:

> [T]he grievance-arbitration machinery of the collective-bargaining agreement remains a relatively inexpensive and expeditious means for resolving a wide range of disputes, *including claims of discriminatory employment practices.* Where the collective-bargaining agreement contains a nondiscrimination clause similar to Title VII, and where arbitral procedures are fair and regular, arbitration may well produce a settlement satisfactory to both employer and em-

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[2] *See McDonald v. City of West Branch,* 466 U.S. 284 (1984); *Barrentine v. Arkansas-Best Freight System, Inc.,* 450 U.S. 728 (1981).

ployee. *Gardner-Denver*, 415 U.S. at 55 (emphasis added).

For these reasons, the Court's holding in *Gardner-Denver* does not resolve the case now before the Court.

A. *Gilmer* Provided The Court With Its First Opportunity To Consider Whether Pre-Dispute Employment Agreements To Arbitrate Statutory Employment Claims Are Binding On The Parties.

The case in *Gilmer* presented the Court for the first time with the question of whether an industry wide pre-dispute employment agreement requiring arbitration of statutory claims was enforceable. The *Gilmer* Court concluded that such statutory claims were in fact arbitrable: "It is by now clear that statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA." *Gilmer*, 500 U.S. at 26. The legal foundation for *Gilmer* was the Court's then relatively recent decisions upholding pre-dispute agreements to arbitrate statutory claims arising out of commercial contract disputes.[3]

Notwithstanding *Gilmer*, the question of whether a pre-dispute CBA requiring arbitration of statutory employment claims is binding and enforceable still remains. As a result, this question is presently before the Court for the first time.[4]

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[3] *Mitsubishi Motors Corp. v. Solar Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989).

[4] The actual wording of the question presented in the petition for writ of certiorari is: "Was the court below correct in holding . . . that a general arbitration clause in a collective bargaining contract bars an employee covered by the contract from filing his own lawsuit under federal anti-discrimination statute?"

B. The Collective Bargaining Agreement At Issue In This Case Contemplates Arbitration Of Statutory Employment Claims.

Some of Petitioner's *amici* have suggested to the Court that it consider whether the CBA at issue in this case did in fact contemplate binding arbitration of claims under the *Americans with Disability Act*, 42 U.S.C. 12101 *et seq.* ("ADA").[5] *See e.g.*, Brief for the United States and EEOC at 20-21. *Amicus* concedes that if the parties did not agree in the CBA to submit ADA claims to binding arbitration, then and only then, would this case fall squarely within *Gardner-Denver's* holding.

Amicus agrees with the holding of the Circuit Court that the arbitration clause in this case was "particularly broad"and was not required to specifically mention ADA claims to bring arbitration of ADA claims within its scope. *Wright v. Universal Maritime Service Corp.*, 121 F.3d 702, 702 (4th Cir. 1997). The Circuit Court correctly compared the CBA language in this case ("Union agrees that this Agreement is intended to cover all matters affecting wages, hours, and other terms and conditions of employment.") with the language of the agreement in *Gilmer* ("any dispute, claim or controversy") and concluded that the CBA language was equally as broad. *Id.* at 702 (citing *Gilmer*, 500 U.S. at 23).

The CBA language in the present case can also be contrasted with the CBA language in *Gardner-Denver*. While the arbitrator in *Gardner-Denver* was limited "solely [to] an interpretation of the provisions of this Agreement," *Gardner-Denver*, 415 U.S. at 42, an arbitrator interpreting the CBA now before the Court would have the broad authority to decide "all matters affecting . . . terms and conditions of employment."

Amicus suggests that, should the Court conclude that the CBA before it now did not, as a contractual matter, contemplate binding arbitration of ADA claims, the Court would have no need to reach the issue of whether a CBA that does contemplate biding arbitration of ADA claims is enforceable.

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[5] It is not clear to *amicus* that this question falls within the scope of the question presented for certiorari.

II. THE PETITIONER HAS NOT MET HIS BURDEN OF SHOWING THAT CONGRESS INTENDED TO PROHIBIT ENFORCEMENT OF A COLLECTIVE BARGAINING AGREEMENT BASED ARBITRATION OF STATUTORY EMPLOYMENT CLAIMS.

Under *Gilmer*, in order to prevail in this case, the Petitioner has the burden of showing that when the ADA was enacted, Congress intended to preclude binding arbitration of ADA claims under a pre-dispute CBA requiring such binding arbitration.[6] Petitioner has not made and cannot make such a showing.

A. The ADA Cannot Be Read As Barring Arbitration Of ADA Claims Under Collective Bargaining Agreements.

Even if the ADA were silent on the issue of arbitration, the Petitioner could not make the showing required by *Gilmer*. The ADA, however, is *not* silent. The plain language of the ADA indicates that Congress enthusiastically endorsed the use of arbitration:

> Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under this Act.

ADA, 42 U.S.C. § 12212 ("ADR clause").[7]

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[6] See *Gilmer*, 500 U.S. at 35. ("We conclude that Gilmer has not met his burden of showing that Congress, in enacting the ADEA, intended to preclude arbitration of claims under that Act.").

[7] Section 513 of the Americans with Disabilities Act of 1990, P.L. 101-336. Section 513 of the ADA is codified at 42 U.S.C.

Several facts are apparent from the plain language of the ADA's ADR clause. First, Congress took the rare step of including its purpose within the text of the statutory clause itself—to encourage the use of alternative means of dispute resolution. Therefore, any interpretation of the remaining language of the clause must be made in light of, and must be consistent with, this Congressionally stated purpose.

Second, Congress intended to encourage a broad range of alternative methods of resolving ADA disputes. Congress expressly endorsed settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration. This broad list of endorsed alternative dispute resolution methods is a further indication that Congress intended for this clause to be read broadly.

Third, there is no statutory basis for concluding that Congress intended to encourage *non-binding* alternative dispute resolution, but to discourage *binding* alternative dispute resolution. There is no reason, based on the text, for concluding that arbitration of ADA claims should be non-binding than there is for concluding that "settlement negotiations" of ADA claims should be non-binding.

Finally, and perhaps most important to this case, there is no textual basis for distinguishing between the use of alternative dispute resolution within the context of a CBA, versus outside the context of a CBA.

The arguments advanced by Petitioner and his *amici* essentially ask the Court to interpret this clause, inserted into the statute for the express purpose of encouraging the use of alternative dispute resolution, in such a fashion as to thwart this express Congressional purpose. The

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§ 12212. Virtually identical language was later included in § 118 of the Civil Rights Act of 1991 ("CRA"), P.L. 102-166, which made the provision applicable to claims filed under Title VII and other laws governed by the amended CRA, including the ADA. Section 118 of the CRA is codified at 42 U.S.C. 1981 note.

Petitioner asks the Court to support this position in the absence of any textual support. And, while the Petitioner and his *amici* have advanced a number of interesting policy arguments in support of their position, policy arguments are not a substitute for the plain language within a statute. Furthermore, such policy arguments are misdirected, since the most appropriate forum for their review is Congress.

B. Nothing In The Legislative Histories Of The ADA Or The CRA Supports Petitioner's Construction Of The Text.

Petitioner urges the Court to view the plain language of Section 513 of the ADA and Section 118 of the CRA encouraging the use of arbitration, in light of the legislative histories of these two provisions, and to exclude CBA based agreements to arbitrate statutory employment claims from their reach. *Amicus* submits that the legislative histories of the two provisions simply do not support this view.

Section 513 of the ADA originated in the House of Representatives, where it was first considered and accepted on May 1, 1990 during House Judiciary Committee markup of H.R. 2273, the bill that eventually was enacted as P.L. 101-336. Congressman Glickman offered the amendment and it was quickly accepted without dissent by voice vote.

While it subsequently became clear that there was some disagreement within the House Judiciary Committee as to the use of alternative dispute resolution in the context of resolving ADA claims, the opponents were unwilling to challenge the amendment directly at the mark-up, presumably because they did not have the votes. At no time during the Committee deliberations on the ADA did either the sponsor of the ADA arbitration clause, or any other member of the Committee express any intent to restrict the scope of the amendment to non-CBA based arbitration agreements. *See* Original Transcript of the Proceedings of the House Judiciary Committee during mark up of H. Rept. 2273, May 1, 1990, pp. 82-83.[8] By all indications, the members of the Committee thought they had just approved a provision "encouraging" the use of arbitration and other non-judicial alternatives to resolve ADA claims, with the sole qualification being "where appropriate and to the extent permitted by law."

Fifteen days later, without any further Committee action, an explanation of the Glickman amendment was offered in the House Judiciary Committee Report on the ADA. This explanation provided several qualifications to the clear text of the amendment. *See* H. Rept. 101-485, Pt. III, p. 76. The inconsistencies between the plain language of the amendment and the Committee Report itself can only be read as an attempt to frustrate the amendment's clearly stated purpose.[9] The drafters of the Report attempted—without vote or debate—to limit the broad scope of the Glickman amendment in several ways.

First, the authors of the Report argued that the purpose of the amendment was to "supplement, not supplant" the remedies provided by the Act. *Amicus* believes that this concept is inconsistent with the language of the amendment. "Supplement(ing)" the judicial resolution of ADA claims is not an "alternative" to judicial resolution of ADA claims. An ADA amendment turning the use of alternative dispute resolution into a supplement to litigation would not "encourage" the use of such an alternative, rather it would discourage its use. It is clear that under this interpretation, both parties would waste time submitting to the alternative forms of dispute resolution if the losing party were free to seek a subsequent *de novo* hearing in a federal district court.

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[8] Under the House Judiciary Committee's practice, executive session documents such as this are available at the Committee's main office (2138 Rayburn House Office Building) for reading only.

[9] The Conference Report notes that the joint conferees also accepted this point of view. H. Rept. 101-596 of July 12, 1990 at p. 89.

The authors of the Committee Report also attempted to limit the unambiguous scope of the Glickman amendment. According to the Committee Report, the amendment does not encompass disputes that arise either in the "context of a collective bargaining agreement or an employment contract." In other words, the amendment does not apply to Title I of the ADA. Thus, the Committee Report contradicts the very language of the amendment, which states that alternative dispute resolution "is encouraged to resolve disputes arising *under this Act.*" Moreover, there was no discussion by the House Judiciary Committee during its consideration of the amendment in terms of limiting the scope of the alternative dispute resolution clause. Clearly, as indicated by the language of the amendment, the amendment's sponsor and its supporters intended no such limitation.

Finally, the authors of the Committee Report (as opposed to the authors and supporters of the amendment) attempted to codify the *Gardner-Denver* opinion. As discussed above, even assuming *arguendo* that the purpose of the amendment was to codify *Gardner-Denver,* such a codification would not resolve the issue presently before the Court. More fundamentally, it is simply not plausible that an amendment intended to encourage the use of alternative dispute resolution would do so by codifying a decision that rejected its very use. Furthermore, as Congress demonstrated in the Civil Rights Act of 1991, when it wants to codify or reject a Supreme Court decision, it knows how to do so without taking such a subcutaneous route.[10]

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[10] CRA § 3 explicitly codifies one opinion of the Court, *Griggs v. Duke Power,* 401 U.S. 424 (1971) while overruling another, *Wards Cove Packing Co. v. Atonio,* 490 U.S. 642 (1989).

Ten months after the passage of the ADA, the Court handed down the seminal opinion in *Gilmer,* in which it held for the first time, that a pre-dispute employment agreement to settle statutory claims through binding arbitration is enforceable. Six months later, Congress enacted the CRA with an alternative dispute resolution clause that was virtually identical to that found in the ADA.

The CRA legislation that ultimately became law was a floor substitute introduced by Senator Danforth that included the alternative dispute resolution clause. This alternative dispute language ultimately became Section 118 of P.L. 102-166. Neither of the two interpretive memorandums placed into the Congressional Record by Senator Danforth indicated his thoughts concerning the proper interpretation of the alternative dispute resolution clause. *See* Cong. Rec. of Oct. 25, 1991 at p. 15276 and Cong. Rec. of Oct. 30, 1991 at p. 29045. Senator Dole—on behalf of himself, several Senators and the administration—did place a memorandum into the record that cited *Gilmer* with favor:

> [I]n light of the litigation crisis facing this country and the increasing sophistication and reliability of alternatives to litigation, there is no reason to disfavor the use of such forums. See *Gilmer v. Interstate/Johnson Lane Corp.,* 111 S. Ct. 1647 (1991). *See* Cong. Rec. of October 30, 1991 at pp. 29034, 29040).

During the House debate on the Danforth substitute, Congressman Edwards included an explanation of Section 118 into the Congressional Record. This explanation mirrored the explanation found originally in the House Report on the ADA (H. Rept. 101-485(III), p. 75). Cong. Rec. of Nov. 7, 1991, at p.30665. Congressman Hyde, on the other hand, included in the record an explanation that was consistent with the interpretation of the Dole memorandum. Cong. Record, Nov. 7, 1991, p. 30683.

While much in the legislative histories of the respective ADR clauses conflict with the plain language of the Glickman amendment and thus is of little value in devining Congressional intent, it is clear that Congress was divided into two distinct camps on the use of alternative dispute resolution in resolving statutory employment claims. Some in Congress vigorously opposed, while others strongly supported, ADR. But the bottom line is that those who supported the use of alternative dispute resolution prevailed when it came to enacting the plain language of the statutes.

III. NO STATUTORY BASIS EXISTS TO DISTINGUISH ARBITRATION SANCTIONED BY *GILMER* FROM CBA BASED ARBITRATION.

As noted above, *Gilmer* has already held that a predispute employment based agreement to arbitrate statutory employment claims is enforceable. Thus, the threshold issue—the enforceability of employment based arbitration —has already been favorably addressed and decided by the Court.

Amicus believes that there is no statutory basis upon which to distinguish *Gilmer* governed arbitration from traditional Labor Management Relations Act governed arbitration.[11] *Amicus* further suggests that finding CBA based arbitration of statutory employment claims enforce-

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[11] *See* Labor Management Relations Act, 29 U.S.C. § 141 *et seq.* *Amicus'* position is also supported by the Court's extensive body of CBA-based jurisprudence decided prior to the passage of the principal federal employment protection statutes. *See Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957); "Steelworkers Trilogy" (*United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960)). While it is true that LMRA based arbitration is seldom governed by the Federal Arbitration Act, LMRA based arbitration is subject to equally rigorous review standards under case law.

able is in the best long term interest of labor-management relations for several reasons.

First, in the modern workplace governed by CBAs, it is almost impossible to resolve contractual employment issues independent of statutory employment issues. Today, given the presence of numerous statutory employment protections, it is likely that when an employer attempts to discipline an employee, that employee will typically raise both contractual and statutory challenges to the employer's action at some point during the CBA governed grievance/ arbitration proceedings. These dual challenges frequently turn on the same set of facts, and independently resolution frequently results in inconsistency. The deciding issue ordinarily is a question of fact the motive of the employer. Consequently, the rule of law sought by Petitioner—restricting the enforcement of the arbitrator's authority to decide CBA based contract questions only, while allowing for independent prosecution of a statutory claim—makes little sense.

As an example of just how intertwined contract and statutory claims have become, one need look no further than this case.[12] The CBA below calls for the arbitration of all matters which cannot be promptly resolved. Presumably this would include disputed work assignments, including Petitioner's initial attempt to be deemed suitable for a work assignment after recovering from a "permanent-total" disability claim under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq*. The ADA requires that disabled employees receive job assignments based on the concept of "reasonable accommodation," however, it also allows employers to set job qualifications based on safety and health considerations in certain circumstances. ADA § 103(b). Ultimately, this statutory consideration may prove to be a factor in resolving the contract based question concerning Petitioner's suitability to return to work.

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[12] Petitioner's CBA claim is intertwined with several federal statutes beyond the ADA. E.g., The Occupational Safety and Health Administration recently revised its vertical safety standards for the Longshoring and Marine Terminals industry, 29 C.F.R. §§ 1917, 1918 respectively. The following language regarding employee medical conditions, as they concern safe cargo handling operations on marine terminals, was incorporated into each of these two safety standards. "No employee known to have defective uncorrected eyesight or hearing, or to be suffering from heart disease, epilepsy, or similar ailments that may suddenly incapacitate the employee, shall be permitted to operate a crane, winch or other power-operated cargo handling apparatus or a power-operated vehicle." *Id.* 1917.27(a)(2); 1918.98(a)(2) (Federal Register, Vol. 62, No. 143, p. 40142 (July 25, 1997)). Under ADA § 501(b) and the EEOC's implementing regulations, 29 C.F.R. 1630.15(e), these two OSHA safety standards effectively preempt ADA rights and remedies in those cases where an employee is affected with any of

If the Petitioner's position prevails, it is doubtful that the Respondents will be able to resolve these conflicting interests. What should employers do if an arbitrator first orders one resolution based on a CBA claim, while independently, a federal court reaches a different conclusion based solely on an interpretation of the ADA, and orders the employers to do another thing?[13] Under the Petitioner's view, there will never be a way to bring these two conflicting claims before a single finder of fact and law for final resolution. As noted above, there is absolutely

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the described conditions. A strict reading of ADA § 501(b) indicates that employer action to comply with the OSHA standards, thus avoiding an OSHA citation, would not trigger ADA liability. *Amicus* further notes that federal district courts do not have subject matter jurisdiction over either the LHWCA or OSH Act, and consequently are without expertise in these areas of the law.

[13] This scenario can also involve the competing interests of two employees which further complicates the employer's predicament. E.g., an employee who receives a new job assignment due to the employer's efforts at providing reasonable accommodation, and in the process bumps another employee with greater job seniority, may cause the second employee to file a statutory discrimination claim. The arbitrator's order may well wind up in conflict with the court's resolution.

no evidence that Congress intended to leave employers in this type of Catch-22 predicament.

Moreover, as previously noted, providing an employee covered by a CBA with two independent challenges to an employer's decision may result in mutually inconsistent decisions. If an arbitrator makes a finding of fact that an employer's action was motivated exclusively by employee malfeasance and nothing else, why should that employee be permitted to argue otherwise in a subsequent legal action?

Finally, if the Petitioner's position were to prevail, the workplace may eventually wind up with two classes of employees in the context of workplace dispute resolution. In the wake of *Gilmer*, appellate courts have endorsed employment based arbitration agreements on may fronts, including agreements quite different than the industry wide employment agreement at issue in *Gilmer*. See, e.g., *Paladino v. Avnet Computer Technologies, Inc.*, —— F.3rd —— (11th Cir. 1998) for a discussion of agreements authorized by that Circuit.

Under Petitioners theory, some employees will get two bites at the apple. First through binding arbitration and second through litigation in federal court if the initial arbitration produces an unsuccessful result. As *amicus* has clearly pointed out above, no statutory basis exists to support an argument that Congress intended for some employees to have their employment claims treated in one fashion, while others are to be treated in a different fashion. Accordingly, *Gilmer*'s umbrella should be extended to cover arbitration of statutory employment claims when CBA based arbitration agreements so provide.

CONCLUSION

Amicus submits that the Fourth Circuit's decision is fully supportable and must be affirmed.

Respectfully submitted,

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17

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—v.—

UNIVERSAL MARITIME SERVICE CORPORATION, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF ON BEHALF OF THE SECURITIES INDUSTRY ASSOCIATION AS AN *AMICUS CURIAE* IN SUPPORT OF AFFIRMANCE

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10 pp

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

I. CONSENT TO FILE *AMICUS CURIAE* BRIEF .. 1

II. STATEMENT OF INTEREST...................... 1

III. SUMMARY OF ARGUMENT 2

IV. ARGUMENT...................................... 2

V. CONCLUSION.................................... 5

TABLE OF AUTHORITIES

Cases PAGE

Alexander v. *Gardner-Denver Co.*, 415 U.S. 36, 94 S.Ct. 1011 (1974) 3

Barrentine v. *Arkansas Best Freight Sys., Inc.*, 450 U.S. 728, 101 S.Ct. 1437 (1981) 4

Bender v. *A.G. Edwards & Sons, Inc.*, 971 F.2d 698 (11th Cir. 1992) 5

Cole v. *Burns Int'l Sec. Servs.*, 105 F.3d 1465 (D.C. Cir. 1997) 5

Gilmer v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 111 S.Ct. 1647 (1991) 3

McDonald v. *West Branch*, 466 U.S. 284, 101 S.Ct. 1799 (1984) 4

Mitsubishi Motors Corp. v. *Soler Chrysler-Plymouth Inc.*, 473 U.S. 614, 105 S.Ct. 3346 (1985) 2

Seus v. *John Nuveen & Co., Inc.*, 1998 WL 294020 (3rd Cir. June 8, 1998) 5

Willis v. *Dean Witter Reynolds, Inc.*, 948 F.2d 305 (6th Cir. 1991) 5

Nghiem v. *NEC Elec., Inc.*, 25 F.3d 1437 (9th Cir. 1994) 5

Other Authorities:

Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.* 3

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000, *et seq.* 5

PAGE

Employment Discrimination: How Registered Representatives Fare in Discrimination Disputes, GAO Report HEHS-94-17 (1994) 2-3

Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* 2

Rule 347, NYSE Rules of Arbitration 3n

I. CONSENT TO FILE *AMICUS CURIAE* BRIEF[1]

The Securities Industry Association ("SIA") files this *amicus curiae* brief with the consent of the parties.

II. STATEMENT OF INTEREST

The SIA brings together the shared interests of more than 780 securities firms throughout North America. SIA members—including investment banks, broker-dealers, specialists, and mutual fund companies—are active in all markets and in all phases of corporate and public finance. In the United States, SIA member firms collectively account for approximately 90 percent, or $100 billion, of securities firm revenues and employ 350,000 individuals. They manage the accounts of more than 5 million investors directly and tens of millions of investors indirectly through corporate thrift and pension plans.

The employees of SIA member firms frequently agree to arbitrate all claims arising out of their employment—either by virtue of registering with a self-regulatory organization whose rules require arbitration or by executing a private arbitration agreement with his or her firm. Further, in the securities industry, employment claims are almost always intertwined with performance issues that may have regulatory significance. For these reasons, arbitration of statutory employment claims is an important part of how SIA's members conduct business.

The SIA is familiar with the questions involved in this case and believes that it would be helpful to the Court to file this *amicus curiae* brief in order to assist the Court in the resolution of this case.

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[1] This *amicus curiae* brief in support of affirmance was funded solely by the SIA and authored entirely by counsel for the SIA.

III. SUMMARY OF ARGUMENT

This Court and the circuit courts of appeal have held that requiring an employee to arbitrate his statutory claims raises unique legal and policy issues when, as here, the agreement to arbitrate is contained in a collective bargaining agreement. First, arbitration of disputes in a unionized setting usually implicates contractual, not statutory, claims. Second, enforcing such an arbitration provision raises concerns regarding the tension between collective representation and individual statutory rights. Finally, individual agreements to arbitrate, unlike collectively bargained agreements, are subject to the Federal Arbitration Act's, 9 U.S.C. § 1, *et seq.* ("FAA"), "liberal policy favoring arbitration agreements." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625, 105 S.Ct. 3346, 3353 (1985).

Because SIA member firms frequently require their employees to enter into agreements to arbitrate which are *not* collectively bargained and which, therefore, do not raise these legal and policy concerns, SIA urges this Court to define the issue presented in this case narrowly and not to issue a broad ruling which implicates individual arbitration agreements.

IV. ARGUMENT

Participants in the securities industry created their own organizations, rules and practices to promote the fair and efficient operation of financial markets. Some of these practices have been in place for over 150 years. One long-established industry practice has been the use of arbitration, rather than litigation, to resolve disputes.

Arbitration of disputes within the securities industry began as early as 1872, when the New York Stock Exchange ("NYSE") became the first securities exchange to provide arbitration as an alternative to resolution of disputes through litigation. *Employment Discrimination: How Registered Representatives Fare in Discrimination Disputes*, GAO Report HEHS-94-17 at 3 (1994) ("GAO Report"). Today, an estimated 32% of the employees of the largest 50 securities firms in the United States have agreed to arbitrate disputes surrounding their employment by signing a Uniform Application for Registration or Transfer (known as a "Form U-4") to register with a self-regulatory organization that requires arbitration of such disputes.[2] *Id.* Other securities industry employees have agreed to arbitrate their employment claims pursuant to private arbitration agreements with SIA member firms.

In *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 111 S.Ct. 1647 (1991), this Court held that a claim for age discrimination under the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.* ("ADEA"), can be subject to compulsory arbitration pursuant to an agreement to arbitrate contained in a Form U-4. Rejecting Gilmer's argument that *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 94 S.Ct. 1011 (1974), precludes arbitration of employment discrimination claims, this Court emphasized the differences between arbitration in the collective bargaining context and agreements to arbitrate pursuant to the Form U-4.

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[2] The Form U-4 requires employees to abide by the arbitration rules of the self-regulatory organizations with which they register:

> I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or by-laws of the organizations with which I register as indicated in Item 10, as may be amended from time to time.

The NYSE's Rules of Arbitration, for example, require arbitration of:

> Any controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative.

Rule 347, NYSE Rules of Arbitration.

Like Ceasar Wright, the plaintiff in *Gardner-Denver* was a union member who brought suit against his employer in federal court asserting a violation of a federal anti-discrimination statute. The district court granted the employer's motion for summary judgment because the issues surrounding the plaintiff's termination previously had been decided by an arbitrator, pursuant to the arbitration provision in the employer's collective bargaining agreement with the union. This Court reversed, emphasizing the difference between contractual rights under a collective bargaining agreement and individual statutory rights, the potential disparity in interests between a union and an employee, and the limited authority and power of labor arbitrators. *Id.* at 49-54, 94 S.Ct. at 1020-22; *Gilmer*, 500 U.S. at 35, 111 S.Ct. at 1657. *See also Barrentine* v. *Arkansas Best Freight Sys., Inc.*, 450 U.S. 728, 101 S.Ct. 1437 (1981); *McDonald* v. *West Branch*, 466 U.S. 284, 104 S.Ct. 1799 (1984).

By contrast, Gilmer, like many employees of SIA member firms, agreed to arbitrate all claims arising out of his employment, including statutory discrimination claims, by executing a Form U-4. As this Court correctly noted in *Gilmer*, employees who sign individual agreements to arbitrate authorize arbitrators to resolve their statutory claims, unlike employees who, by virtue of their union membership, submit claims arising out of the applicable collective bargaining agreement to arbitrators whose decision-making authority is limited to contract-based disputes. *Gilmer*, 500 U.S. at 35, 111 S.Ct. at 1657. Further, an "important concern" raised by arbitration in the context of a collective bargaining agreement is the tension between collective representation and individual statutory rights, a concern not applicable in [*Gilmer*]." *Id.* That is, "[i]n arbitration, as in the collective-bargaining process, the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit." *Gardner-Denver*, 415 U.S. at 58 n.19, 94 S.Ct. at 1024 n.19. Lastly, an arbitration agreement contained in an individual arbitration agreement such as a Form U-4, unlike an arbitration provision in a collective bargaining agreement, must be analyzed under the rubric of the FAA's "liberal federal policy favoring arbitration agreements." *Gilmer*, 500 U.S. at 35, 111 S.Ct. at 1657 (quoting *Mitsubishi*, 473 U.S. at 625, 105 S.Ct. at 3353).

Simply put, because arbitration agreements in the collective bargaining context present unique policy concerns, this Court and others have held that *Gardner-Denver* does not preclude compulsory arbitration of statutory claims pursuant to individual agreements to arbitrate, such as the Form U-4. *Id.* at 33-35, 111 S.Ct. at 1656-57; *see also Seus* v. *John Nuveen & Co., Inc.*, 1998 WL 294020 (3rd Cir. June 8, 1998); *Cole* v. *Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1478-79 (D.C. Cir. 1997); *Bender* v. *A.G. Edwards & Sons, Inc.*, 971 F.2d 698, 700 (11th Cir. 1992); *Willis* v. *Dean Witter Reynolds, Inc.*, 948 F.2d 305, 308 (6th Cir. 1991); *But cf. Nghiem* v. *NEC Elec., Inc.*, 25 F.3d 1437, 1441 (9th Cir. 1994). Thus, this Court should limit its holding in the instant case to arbitration of statutory employment claims pursuant to arbitration provisions contained in collective bargaining agreements.

V. CONCLUSION

Arbitration of employment claims pursuant to individual agreements to arbitrate, such as the Form U-4, at least in the context of claims brought under the ADEA has already been decided by this Court in *Gilmer*. Whether the rationale and holding of *Gilmer* applies with respect to individual agreements to arbitrate claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, should not be resolved in the context of this case but, rather, should be addressed by the Court when that issue is squarely before it. Therefore, *amicus curiae*, the SIA, respectfully requests that this Court limit its ruling in the instant case to arbitration of claims pursuant to the arbitration provisions of collective bargaining agreements.

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Respectfully submitted,

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